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It is a curious circumstance that within a few months the highest courts, in four of the States, have passed upon the question as to the right of a wife to sue another woman for alienating the affections of her husband, or technically speaking, seducing him. Such suits are rare, compared with the number of corresponding ones brought by a husband against another man. It is not less curious to note the conflict of opinion in these four cases. In Maine and Wisconsin the right of the wife was denied. In New Hampshire and New York it was affirmed. The cases from the three last named States were reported and commented upon by us in a recent number of the JOURNAL. The case from Maine (Doe v. Roe, 20 Atl. Rep. 83) has but recently come to hand. In that case the court say they have been referred to no reliable authority for the existence of such a right and can find none. Evidently their search was not as thorough as that of the New Hampshire judges.

There has never been any question as to the right of a husband to bring such a suit. But the Supreme Court of Wisconsin holds that the right of a wife to the society of her husband is not the same as his right to her society. The loss of her husband's society is not an injury to her person, property, means of support or character. "There are," says Judge Orton, "natural and interchangeable conditions of husband and wife that make that right radically unequal and different." He says further:

> The wife is more domestic and is supposed to have the personal care of the household, and her duties in the domestic economy require her to be more constantly at home, where the husband may enjoy her society. She is purer and better by nature than her husband and more governed by principle and a sense of duty. Actions against others for enticing her away from her home and her husband's society are not frequent. She is protected from such wrong not only by her integrity of character, but by greater love for her family and the comforts and genial influences of home life.

With the husband, the court goes on to say, the case is different:

> He may not be his wife's superior in the sense of the common law or in anything, and may be her inferior in many things, but he is charged with the duty of providing for, maintaining and protecting his wife and family. He is engaged for this purpose in the business and various employments of the outside world that must necessarily more or less deprive his wife of his society. He may be kept away from home for months or years. He is exposed to the temptations, enticements and allurements of the world. The wife had reason to expect all these things when she entered the marriage relation.

Such stuff is not creditable to the bench from which it comes. It finds its refutation in the following language of Judge Vann in the New York case:

> The actual injury to the wife from the loss of consortium, which is the basis of the action, is the same as the actual injury to the husband from that cause. His right to the conjugal society of his wife is no greater than her right to the conjugal society of her husband. Marriage gives to each the same rights in that regard. Each is entitled to the comforts, companionship and affection of the other. The rights of the one and the obligations of the other spring from the marriage contract, and are mutual in character. Any interference with these rights, whether of the husband or the wife, is a violation not only of a natural right, but also of a legal right arising out of the marriage relation.

The opinion of the Wisconsin and Maine courts revive the old common-law notion that a wife is the slave of her husband. The opinions of the New Hampshire and New York courts, in our judgment, embody the true modern principle that a wife is the equal of her husband.

The need of legislation, for the relief of the United States Supreme Court, naturally formed a subject of reference in the annual address of the president of the American Bar Association at Saratoga recently. It was shown by the statistics of cases docketed, cases disposed of and cases remaining undisposed of at each term of the court, that the burden upon the court is a constantly growing one. For example, at the close of the October term, 1885, nine hundred and four cases remained undisposed of. At the close of the October term, 1889, there were on the docket of the court one thousand one hundred and eighty cases undisposed of. This represents an increase of two hundred and thirty-two cases as compared with four years ago. It seems vain to hope that the court can get anywhere near abreast of its business until an act is passed relieving it of some share of its burden.

NOTES OF RECENT DECISIONS.

CARRIERS—USE OF PASSENGER PLATFORM.—In Montana Union Ry. Co. v. Langlois, 24 Pac. Rep. 209, the Supreme Court of Montana consider the interesting question as to the right of railroad companies to grant to hack lines exclusive privileges in the use of depot platforms, holding that a railroad company cannot grant an exclusive privilege of that character. The court, in the following language, disapproves of the recent ruling of the Massachusetts court in Railroad Co. v. Tripp:

The reported cases, involving like or similar facts as the one at bar, which have come to our attention, are few in number. The recent case of Railroad Co. v. Tripp, 147 Mass. 35, 17 N. E. Rep. 89, is the nearest in point. The facts involved in that case are quite similar to the case at bar, although it appears from the statement of facts and the opinion that while exclusive grant was made by the railroad company to Porter & Sons to come upon the depot premises to solicit passengers and baggage for transportation, and all other hackmen were forbidden to come there for that purpose, still all hackmen were allowed equal privileges to come to the station to deliver passengers and baggage, and to receive such as they had a previous order for. While we concur in the general principles of law applicable to common carriers announced by the majority of the nearly evenly divided court in that case, we cannot subscribe to the conclusions drawn by the majority. On the contrary, after a careful consideration of that case, we are inclined to adopt the reasoning and conclusion of the dissenting opinion delivered by the three minority judges. The majority opinion in that case very clearly and forcibly states the general principles of law governing common carriers applicable to the present consideration. The court says: "The plaintiff is obliged to be a common carrier of passengers. It is its duty to furnish reasonable facilities and accomodations for the use of all persons who seek for transportation over its road. It provides its depot for the use of persons who were transported on its cars, to or from the station, and holds it for that use; and it has no right to exclude from it persons seeking access to it for the use for which it was intended and is maintained. It can subject the use to rules and regulations; but by statute, if not by common law, the regulations must be such as secure reasonable and equal use of the premises to all having such right to use them." We do not find it consonant with reason, based upon those general propositions, to draw the conclusion that the railroad company may bring its passengers to a common landing, where the necessity, comfort, or convenience of their situation compels them to obtain on their own account transportation to some place beyond, and there introduce them to one favored party, saying: "If you engage transportation from this party, you may do so here on the spot, without delay or inconvenience, and take passage from this platform without delay or inconvenience, provided you will engage this particular party, and pay his demands; otherwise, you must suffer the importunity of this party to take passage with him, and if you will not, you must suffer the inconvenience and delay of going to some other point to engage conveyance and take passage." All this the railroad does, not for a benefit to the passengers, but for a benefit to itself, over and above what the passenger has paid for transportation over the railroad. If the railroad company set bounds beyond which all hackmen were forbidden to come, and undertook to forbid all solicitation within the depot or on the platform on the part of hackmen or others for employment, this would be an entirely different proposition. The company does not undertake to protect the passenger from that annoyance in these cases, but invites it, and farms out the exclusive privilege and opportunity to do this. In the case cited *supra*, the majority of the court bases its conclusion on the ground that the hackman has no right or license to be in plaintiff's depot without the express or tacit permission of plaintiff; and this license, if granted, may be revoked at pleasure. We may grant this premise. The right which the railroad has to exclude all hackmen from its depot buildings and platform may rest upon the same principle. But has the railroad company, in dealing with its passengers, and exercising a control over their movements and the conditions which surround them for the time being, a right to place one hackman in their midst, with exclusive control over the common conveniences and facilities of the place at which the passenger may land or from which he may depart, so that, if the passenger obtain the use of these conveniences and facilities, he must purchase the privilege from such hackman or suffer discrimination? The use of these common conveniences and facilities belong to the passengers alike, in the order in which they may come to occupy them; whereas the railroad company has granted away what belonged to the passengers in common, and the one holding the grant may use it as an advantage over the passenger, to compel his employment. It is said in the opinion cited *supra:* "If a railroad company allows a person to sell refreshments or newpapers in its depots, or to cultivate flowers on its station grounds, the statute does not extend the same right to all persons. * * *

The case cited *supra* is the only American case brought to our attention which passes upon points directly involved herein. The subject is apparently a new one in this country. The English cases involving the main subject of controversy are also few in number. In the case of Marriott v. Railway Co., 1 C. B. (N. S.) 499, the complainant, Marriott, alleged that he brought passengers to defendant's railway station, and the latter refused him access to the station grounds to deliver his passengers there, while at the same time this privilege was granted to other omnibuses; and, upon this showing, an injunction was granted. Other English cases bearing upon the main subject here under consideration have been examined. Beadell v. Railway Co., 2 C. B. (N. S.) 509; Painter v. Railway Co., *Id.* 702; Barker v. Railway Co., 18 C. B. 46.

TELEPHONE COMPANY — ELECTRICAL RAILWAY—INJUNCTION. - A few months ago we called attention to and printed in full the opinion of a Cincinnati court sustaining an injunction against an electrical railway on account of damage caused to existing telephone companies. The recent decision of

Cumberland Telephone & Telegraph Co. v. United Electric Ry. Co., 42 Fed. Rep. 273, by the United States circuit court for Tennessee, seems to deny or at least to qualify this doctrine. It is there held that in the present state of electrical science, a telephone company cannot maintain a bill for an injunction against the operation of an electric railway to prevent damages incidentally sustained by the escape of electricity from its rails. Brown, J., after commenting on the facts in the case, says:

We are asked to determine how far a person making a lawful and careful use of his own property, or of a franchise granted to him by the proper municipal authorities, is liable for damages incidentally caused to another; in other words, whether the right of the latter to an injunction does not depend upon something more than the simple fact that he has suffered injury, though his right to an undisturbed use of his own may antedate that of another. It is true that in one case, namely, Reinhardt v. Mentasti, 42 Ch. Div. 685, it is said that the principle governing the jurisdiction of the court in cases of nuisance does not depend upon the question whether the defendant is using his own reasonably or otherwise, but upon the question, does he injure his neighbors? This case lays down a broader doctrine of liability than any to which our attention has been called, but it is sufficient to say in reply to it that nothing which is authorized by competent authority can be treated as a nuisance *per se*. Transportation Co. v. Chicago, 99 U. S. 635; Hinchman v. Railroad Co., 17 N. J. Eq. 77; Easton v. Railroad Co., 24 N. J. Eq. 58; Railway Co. v. Heisel, 38 Mich. 62; Davis v. Mayor, 14 N. Y. 506. We take it to be well settled, so far as persons operating under legislative grants are concerned, that something more than mere incidental damage to another must be proved—something, in fact, in the nature of an abuse of the franchise—to entitle the party injured to an injunction. It is perfectly obvious that there are a large number of instances in which a person may suffer damages without recourse to the offender. Thus, the smoke that fills our lungs, and soils our garments; the dust that enters our dwellings and stores, and damages our furniture; the noxious odors that assail our nostrils; the impure water we are sometimes compelled to drink—are the necessary penalities we pay for living in cities; but in ordinary cases there is no legal remedy for the evil. In the somewhat flowery language of Lord Justice James, in Salvin v. Coal Co., L. R. 9 Ch. 705:

"If some picturesque haven opens its arms to invite the commerce of the world, it is not for this court to forbid the embrace, although the fruit of it should be the sights and sounds and smells of a common seaport and ship building town, which would drive the Dryads and their masters from their ancient solitudes."

I may expend a fortune in building a handsome house 30 or 40 feet from my front fence. My neighbors upon either side may build theirs upon the line of the street, and completely ruin its market value. In the absence of a prescriptive right on my part, they may wall up my windows and completely exclude the light, or undermine the foundation of my outer wall so that it crack and tumble down. But, if it be necessary to the beneficial enjoyment of their own property, I have no remedy. Panton v. Holland, 17 Johns. 92. There are undoubtedly a large number of cases where persons have been held liable for an infringement upon the maxim, *sic utere tuo ut alienum non lædas;* but, upon examination, they will usually be found to turn upon questions of negligence or nuisance.

1. There is no doubt that every person is bound to the exercise of reasonable care in the use of his own property; and for any default in that particular, he will be liable to the person injured in an action for negligence. Thus, in Vaughan v. Menlove, 3 Bing. (N. C.) 468, defendant was held liable for negligence in building a hay-rick so near the extremity of his own land that, in consequence of its spontaneous ignition, his neighbor's house was burned, although, in Higgins v. Dewey, 107 Mass. 494, this principle was limited to cases where the burning was negligent, or might reasonably have been expected to injure the property of the neighbor. This was the real ground upon which a recovery was permitted in the leading case of Rylands v. Fletcher, L. R. 3 H. L. 330, though the case is often cited for the broader proposition, that the person who, for his own purpose, brings on his land and collects and keeps anything there likely to do mischief if it escapes, must keep it at his peril. This case has not been accepted either in England or in this country without some qualifications. The same rule applies if a man permit a wall which had been negligently constructed to fall upon his neighbor's house (Gorham v. Gross, 125 Mass. 232), or a chimney to which a gas-light company had fastened a a telegraph wire. Gray v Gas-Light Co., 114 Mass. 149. The principle of these cases was also applied in Tarry v. Ashton, 1 Q. B. Div. 314, where it was held to be the duty of a person hanging a lamp over the highway to keep in good repair. This case proceeds, perhaps, as far as any in holding the defendant responsible.

To the same principle is also referable the case of Coke Co. v. Vestry of St. Mary Abbott's, 15 Q. B. Div. 1, whereby the defendants were held liable for using steam-rollers, in repairing a highway, so heavy that they injured the gas-pipes of the plaintiff. The statement of the case shows that the pipes were laid from 20 to 24 inches beneath the surface of the streets, and that this was a sufficient depth to prevent their being injured by the ordinary travel of the streets, and also by the ordinary mode of repair, if steam-rollers of great weight had not been used. The decision was put by the court upon the express ground that heavier rollers were used than were necessary; and it was said that, if "the defendants were expressly authorized by statute to use steam-rollers of such a weight as necessarily to injure the plaintiff's pipes, the plaintiff's would have no ground of complaint. The case would then be one of *damnum absque injuria*. The same consequence would follow if the defendants were expressly authorized by statute to repair in some way which necessarily required the use of heavy steam-rollers, or other machinery which could not be worked without injuring the plaintiff's pipes."

2. Similar to these are the cases in which persons have been held liable for keeping upon their land anything which operates as a nuisance to their neighbors generally, or to any particular individual. Upon this principle, if a person allows a privy to get out of repair, and the water percolates into his neighbor's cellar (Tenant v. Golding, 1 Salk. 21; Ball v. Nye, 99 Mass. 582; Ballard v. Tomlinson, 29 Ch. Div. 115; Cooley, Torts, 568), or maintains a mill-dam in an

unsafe condition (Mayor v. Bailey, 2 Denio, 433; Gray v. Harris, 107 Mass. 492), or permits injurious accumulations of snow or ice upon his roof (Shipley v. Fifty Associates, 106 Mass. 194), or permits loud and unnecessary noises (Brill v. Flagler, 23 Wend. 354; Tanner v. Albion, 5 Hill, 121), or carries on a trade offensive to the neighborhood, by reason of dust, smoke, foul odors, or jar of machinery, or otherwise (Cooley, Torts, 600, 601), he is liable for the consequences. In all this class of cases, the question whether the carrying on of an offensive buisness is a nuisance or not depends very largely upon the character of the neighborhood, the time it has been carried on without objection, and the prior use of the buildings in the vicinity, as a trade may be adjudged a nuisance in one place, and not in another. Gilbert v. Showerman, 23 Mich. 448; Robinson v. Baugh, 31 Mich. 290.

A leading case in the federal courts is that of Baltimore & P. R. Co. v. Fifth Baptist Church, 108 U. S. 317, 2 Sup. Ct. Rep. 719. In that case it was held that legislative authority to a railroad company to bring its tracks within the limits of the city of Washington, and to construct shops and engine-house there, did not confer upon it authority to erect noisy workshops in the immediate vicinity of a church where services had been held several times during the week for a number of years before the erection of the shops. But, in delivering the opinion in that case, Mr. Justice Field drew a distinction between nuisance of that description, and a railway through the streets authorized by congress, which, when used with reasonable care, produces only that incidental inconvenience which unavoidably follows the additional occupation of the streets by its cars, with the noises and disturbances necessarily attending their use, and affords no ground of complaint. "Whatever consequential annoyance may necessarily follow from the running of the cars on the road with reasonable care is *damnum absque injuria*."

3. There are also a few cases which indicate that, even if a man be guilty of no negligence, but is engaged in doing something dangerous in its nature, he is liable for the immediate and direct consequences of his acts. Thus, in Hay v. Cohoes Co., 2 N. Y. 159, the defendant, a corporation engaged in digging a canal, was held liable for blasting rocks in such a way that the fragments were thrown against, and injured, plaintiff's dwelling, upon lands adjoining. It was held that it was liable although no negligence or want of skill was alleged or proved. The doctrine laid down in this case, however, was carefully limited in the subsequent case of Losee v. Buchannan, 51 N. Y. 476, in which the owner of a steam-boiler was held not to be liable for damages occasioned by its explosion, in the absence of proof of fault or negligence on his part; and it was said that the defendant was held liable in the Cohoes Case upon the ground that its acts in casting the rocks upon the plaintiff's premises were direct and immediate. In the same line is the case of Cahill v. Eastman 18 Minn. 324 (Gil. 292), in which the defendants were held liable for the consequences of an ordinary spring freshet, without proof of negligence or unskillfulness on their part in the construction and maintenance of a tunnel through which water flowed and damaged the plaintiff's mill. Defendants' liability was put upon the ground that the damages the plaintiff sustained were the direct and immediate result of the defendants' operations on their own land. "The plaintiffs had a right to hold their property free of such a result of the defendants' use of their land." The authorities are carefully collated, and the opinion is a very instructive one. These cases would be apposite, if the defendants had found it necessary, in the construction of their line, to cut the wires of the telephone company, remove its posts, or commit any other direct depredation upon its property.

4. Subject to these exceptions, we understand the law to be well settled that no person is liable for damages incidentally occaisoned to another by the necessary and beneficial use of his own property, or of a franchise granted to him by the State. The principle is thus stated by Judge Woodworth in Panton v. Holland, 17 Johns. 92-99:

"On reviewing the cases, I am of opinion that no man is answerable in damages for the reasonable exercise of a right, when it is accompanied by a cautious regard for the rights of others, when there is no just ground for the charge of negligence or unskillfulness, and when the act is not done maliciously."

Illustrations of this principle are plentifully scattered through the reports. It extends not merely to the digging up of ground for a new building, whereby the walls of the next house are injured (Panton v. Holland, 17 Johns. 92-99; Thurston v. Hancock, 12 Mass. 220), but to the burning of fallow land, whereby fire is communicated to adjoining lands (Clark v. Foot, 8 Johns. 329), to the erection of a mill-dam, whereby water is in part diverted from a lower mill (Platt v. Johnson, 15 Johns. 213), to the building of a basin or bridge, whereby access to plaintiff's dock is obstructed (Lansing v. Smith, 8 Cow. 148, 4 Wend. 9; Gilman v. Philadelphia, 3 Wall. 713), and even to the pollution of a stream by the discharge of tan-bark from an upper mill, which was suffered to float down upon the mill of the plaintiff, where it was shown to have been the uniform custom of the country to permit it. Snow v. Parsons, 28 Vt. 459. A distinction is drawn between cases where the pollution of a stream is indispensable to its beneficial use, and cases where the pollution is such as to make it absolutely useless to manufacturers lower down the river. Of the latter class is Merrifield v. Lombard, 13 Allen, 16, where the defendant threw vitriol and other noxious substances into the stream a short distance above plaintiff's factory, by means of which the water was corrupted so that it corroded plaintiff's engine and boiler, and rendered them unfit for use. In such cases the court will weigh the circumstances and necessities of the case, and the manner in which the stream has heretofore been used. Cooley, Torts, 587. In the case of Coal Co. v. Sanderson, 113 Pa. St. 126, 6 Atl. Rep. 453, it was held that one operating a coal mine in the ordinary and usual manner may drain or pump water upon his own lands, which percolates into the stream which forms the natural drainage of the basin in which the mine was situated, although the quanity of water may thereby be increased, and its quality so affected as to render it totally unfit for domestic purposes by the lower riparian owners. It was intimated that the use and enjoyment of a stream of pure water for domestic purposes must, from the necessity of the case, give way to the interests of the communities, in order to permit the development of the natural resources of the country, and to make possible the prosecution of lawful business of mining coal. It is said, in the opinion of the court, to be a "general proposition, that every man has the right to the natural use and enjoyment of his own property; and if, whilst lawfully in such use and enjoyment, without negligence or malice on his part, an unavoidable loss occurs to his neighbor, it is *damnum absque injuria;* for the right-

ful use of one's own land may cause damage to another without any legal wrong."

The same principle is applicable to the case of a public officer, who, if authorized by law to excavate earth in grading a street, or constructing a tunnel, will not be responsible, in the absence of negligence, for damage to abutting property owners. Smith v. Washington Corp., 20 How. 135; Transportation Co. v. Chicago, 99 U. S. 635; Callender v. Marsh, 1 Pick. 418; Radcliff's Exrs. v. Mayor, 4 N. Y. 195. In this last case, it is said that an act done under lawful authority, if done in a proper manner, can never subject the party to an action, whatever consequences may follow. The case of McCombs v. Akron, 15 Ohio, 474, in which it was held that a corporation was liable for injuries to plaintiff's property in cutting down and grading a street, is opposed to the great weight of authority, and in a number of cases has been denied to be law. See, also, Chapman v. Railroad Co., 10 Barb. 360. In Steel Co. v. Kenyon, 6 Ch. Div. 773, it is said, with regard to the storage of water upon defendant's land, that is was necessary for the plaintiff to show, not only that he had sustained damage, but that the defendant had caused it, by going beyond what was necessary in order to enable him to have the natural use of his own land. In Attorney-General v. Asylum, L. R. 4 Ch. 146, defendant was held liable for polluting a stream by its sewage, upon the ground that the evil might have been remedied by depositing the sewage elsewhere. Other instances of serious damage, suffered without the possibility of recourse, may occur whenever a rival bridge is authorized to be built across a stream, as was done in Charles River Bridge v. Warren Bridge, 11 Pet. 420. The building of a new railroad may destroy the value of a turnpike, of a line of coaches, of taverns, public houses, and even of small towns lying along its line. Illustrations are found in Boulton v. Crowther, 2 Barn & C. 703; and Nichols v. Marsland, L. R. 10 Exch. 255.

In Rockwood v. Wilson, 11 Cush. 226, it is said that "nothing can be better settled than that, if one do a lawful act upon his own premises, he cannot be held responsible for injurious consequences that may result from it, unless it was so done as to constitute actionable neligence." What shall be considered indirect, as distinguished from direct injuries, is clearly stated in Railroad Co. v. Marchant, 119 Pa. St. 541, 13 Atl. Rep. 690, in which a construction was given to a constitutional provision of Pennsylvania securing just compensation by corporations for property "injured or destroyed," as well as "taken." It was held to be confined to such injuries to one's property as are actual, positive, and visible—the natural and necessary results of the original construction or enlargement of its works by a corporation, and of such certain character that compensation therefor may be ascertained at the time the works are being constructed or enlarged, and paid or secured in advance, as distinguished from indirect injuries to the plaintiff, which were the result merely of a subsequent operation of its railroad in lawful manner, without negligence, unskillfulness, or malice.

The substance of all the cases we have met with in our examination of this question—and we have cited but a small fraction of them—is that, where a person is making lawful use of his own property, or of a public franchise, in such a manner as to occasion injury to another, the question of his liability will depend upon the fact whether he has made use of the means which, in the progress of science and improvement, have been shown by experience to be the best; but he is not bound to experiment with recent inventions, not generally known, or to adopt expensive devices, when it lies in the power of the person injured to make use himself of an effective and inexpensive method of prevention. Hoyt v. Jeffers, 30 Mich. 181. If, in the case under consideration, it were shown that the double trolley would obviate the injury to complainant without exposing defendants or the public to any great inconvenience or a large expense, we think it would be their duty to make use of it, and should have no doubt of our power to aid the complainant by an injunction; but, as the proofs show that a more effectual and less objectionable and expensive remedy is open to the complainant, we think the obligation is upon the telephone company to adopt it, and that defendants are not bound to indemnify it; in other words, that the damage incidentally done to the complainant is not such as is justly chargeable to the defendants. Unless we are to hold that the telephone company has a monopoly of the use of the earth and of all the earth within the city of Nashville, for its feeble current, not only as against the defendants, but as against all forms of electrical energy which, in the progress of science and invention, may hereafter require its use, we do not see how this bill can be maintained.

CONSTITUTIONAL LAW — POLICE POWER — TRADE LICENSE.—The Court of Appeals of Maryland, in Singer v. State, 19 Atl. Rep. 1044, hold that the act of 1886, requiring plumbers to get a certificate of competency from the State board of commissioners of practical plumbing before they can engage in the business in the city of Baltimore, is a reasonable exercise of the police power of the State, not in violation of Const. U. S. 14th Amend. § 1, or of Const. Md. art 23 of the Bill of Rights. Robinson, J., says:

These constitutional safeguards have been so fully considered and discussed by the supreme court, especially since the adoption of the fourteenth amendment, by which the restraint upon the power of the States to pass laws affecting personal and private rights was made a part of the federal constitution, that it can only be necessary to refer to the conclusions reached by that court as affecting the question before us. Dent v. West Virginia, 129 U. S. 114, 9 Sup. Ct. Rep. 231; Barbier v. Connolly, 113 U. S. 27, 5 Sup. Ct. Rep. 357; Mugler v. Kansas, 123 U. S. 623, 8 Sup. Ct. Rep. 273; Soon Hing v. Crowley, 113 U. S. 703, 5 Sup. Ct. Rep. 730; Powell v. Pennsylvania, 127 U. S. 678, 8 Sup. Ct. Rep. 982, 1257. No one questions the right of every person in this country to follow any legitimate business or occupation he may see fit. This is a privilege open alike to every one. His own labor, and the right to use it as a means of livelihood, is a right as sacred and as fully protected by the law as any other personal or private right. But broad and comprehensive as this right may be, it is subject to the paramount right, inherent in every government, to impose such restraint and to provide such regulations in regard to the pursuits of life as the public welfare may require. This paramount right rests upon the well-recognized maxim, "*salus populi est suprema lex;*" and, whatever difficulty there may be in defining the precise limits and boundaries by which the exercise of this power is to be governed, all agree that laws

and regulations necessary for the protection of the health, morals, and safety of society are strictly within the legitimate exercise of the police power. Powell v. Pennsylvania, 127 U. S. 678, 8 Sup. Ct. Rep. 992, 1257; Mugler v. Kansas, 123 U. S. 623, 8 Sup. Ct. Rep. 273; Railway Co. v. Beckwith, 129 U. S. 26, 9 Sup. Ct. Rep. 207. As to the common and ordinary occupations of life, little or no regulation may be necessary; but if the occupation or calling be of such a character as to require a special course of study or training or experience to qualify one to pursue such occupation or calling with safety to the public interests, no one questions the power of the legislature to impose such restraints, and prescribe such requirements, as it may deem proper for the protection of the public against the evils resulting from incapacity and ignorance; and neither section one of the fourteenth amendment of the federal constitution, nor article 23 of the bill of rights of the constitution, of this State, was designed to limit or restrain the exercise of this power. It is in the exercise of this power that no one is allowed to practice law or medicine or engage in the business of a druggist unless he shall have been found competent, and qualified in the mode and in the manner prescribed by the statute; and although the business and trade of a plumber may not require the same training and experience as some other pursuits in life, yet a certain degree of training is absolutely necessary to qualify one as a competent and skillful workman. We all know that in a large city like Baltimore, with its extensive system of drainage and sewerage, the public health largely depends upon the proper and efficient manner in which the plumbing work is executed, and, this being so, the legislature not only has the power, but it is eminently wise and proper that it should, provide some mode by which the qualifications of persons engaged in that business shall be determined.

In considering the power of the legislature to impose restraints upon all persons engaged in certain pursuits, the supreme court say: "The nature and extent of the qualifications required must depend primarily upon the judgment of the State as to their necessity. If they are appropriate to the calling or profession, and attainable by reasonable application, no objection to their validity can be raised." Dent v. West Virginia, 129 U. S. 114, 9 Sup. Ct. Rep 231. The act of 1886 now before us provides in the first place that no one shall engage in the buisness of plumbing except those qualified to work as registered plumbers; and further, that no one shall be qualified to work as a registered plumber unless he shall have made application to and received from the State board of practical plumbers appointed by the government a certificate as to his competency. These requirements are appropriate, and relate to the business of plumbing, and are such as the legislature deemed necessary and proper for the protection of the health of the people of Baltimore against the consequences resulting from the work of incompetent and inexperienced plumbers.

ILLEGAL AND INOPERATIVE CLAUSES IN INSURANCE POLICIES.

The insurance companies have ever sought to protect themselves against fraud and false claims on the part of their patrons by inserting such provisions in their policies as would attain such end. But, no sooner was the end attained, in their opinion, and in the opinion of the eminent counsel employed in draughting the policy, than the courts would proceed to "undo" their work. Policies have been written and rewritten to conform to the decisions of the courts, as was supposed, only to be held, when the question was submitted, that the language used was ambiguous, or the terms employed were illegal, or inoperative. The worst feature the companies have had to combat, in insurance litigation, is "the agent." His "knowledge" is wonderful, and has been held to extend to almost everything he sees, hears, smells, touches or tastes, whether in connection with the party to be insured or not, so long as it can be, in the remotest degree, connected with the risk. Almost numberless have been the devices employed by the companies to protect themselves against this "knowledge" of the agent. A clause which was universally found in insurance policies a few years ago, and is still retained to a large extent, is the following: "And it is a part of this contract that any person other than the assured who may have procured this insurance to be taken by the company shall be deemed to be the agent of the assured named in the policy, and not of this company, under any circumstances whatever, or in any transaction relating to this insurance."

While this clause was, in a few instances, held to be operative,[1] so as to constitute such person the agent of the insured, the overwhelming weight of authority is against it, and it has been held, if not illegal, at least inoperative.[2] The Supreme Court of Wiscon-

[1] Grace v. American Central Ins. Co., 16 Blatch. 433; Wood v. Firemen's Ins. Co., 126 Mass. 316.

[2] Gans v. St. Paul F. & M. Ins. Co., 43 Wis. 108; Gates v. Penn. Fire Ins. Co., 10 Hun, 489; Sprague v. Holland Purchase Ins. Co., 69 N. 128; Boetcher v. Hawkeye Ins. Co., 47 Iowa, 253; Planters' Ins. Co., 55 Miss. 479; Partridge v. Commercial Fire Ins. Co., 17 Hun, 95; White v. Germania Fire Ins. Co., 76 N. Y. 415; Sullivan v. Phœnix Ins. Co., 34 Kan. 170; Kausal v. Minnesota Farmers' Mut. Fire Ins. Assn., 31 Minn. 17; American Life Ins. Co. v. Mahone, 56 Miss. 180;

sin, in Gans v. St. Paul F. & M. Ins. Co.,[3] in passing on this clause say, "Whatever may be the true construction of the stipulation, it certainly does not, and cannot sustitute the plaintiff as the principal of Latimer & Co." (the agents), "in respect to the contract of insurance in the place of the company. The contract was made, and the defendant was undoubtedly bound by it from the moment the policy was delivered to plaintiff, and if the stipulation substitutes the plaintiff for the company as the principal of Latimer & Co., then it is competent for a person to make a contract with his own agent which shall bind a third party who is a stranger to it, and who never agreed to be bound by it. This would be a manifest absurdity.

The companies, finding that this clause was inoperative for their protection next devised the clause, which they inserted in their applications, and made a part of the policy that "it is further understood and agreed that no statement made to or by any agent or other person in procuring this insurance shall be binding on this company unless such statements are in writing in this application, when the same is received by this company at its home office."

It looked very much as though the companies had at last found a clause that would "withstand assult." A number of courts upheld it.[4] But a recent decision in the United States Supreme Court holds that this clause is ineffectual for the purposes intended.[5] The companies again sought to protect themselves against the acts of their agents by inserting in their policy the following clause: "It is expressly covenanted by the parties hereto that no officer, agent or representative of this company shall be held to have waived any of the terms or conditions of this policy, unless such waiver shall be indorsed hereon in writing." This clause was upheld in some cases;[6] but the decided weight of authority against it,[7] the rule being that any agent who is authorized to indorse a written consent, has authority to waive, orally, the condition of the policy requiring indorsement. Leaving the agent, we direct our attention to the clauses more nearly connected with the assured; clauses which the courts say have no effect.

Some of the insurance companies have attempted to nullify the effects of the law existing in most States, that actions by or against foreign insurance companies shall not be brought in or removed to the United States courts, by inserting in their policy or application a clause to the effect that "all suits against this company on this policy shall be brought in the courts of the United States, and not elsewhere." Under some circumstances and conditions, such limitation has been upheld,[8] but where upheld, such clause, or one similar, in effect, was found in the charter of a mutual company or fraternal order. The rule seems to be, however, that where the company is not a mutual one, and protected by a charter-provision, such clause is void. As was said by the Supreme Court of Massachusetts, in Hall v. Peoples' Mut., etc. Co.:[9] "It is a well settled maxim that parties cannot, by their consent, gives jurisdiction to courts where the law has not given it; and it seems to follow, from the same course of reasoning,

Andes Fire Ins. Co. v. Loehr, 6 Daly, 105; Eilenberger v. Protective Mut. Fire Ins. Co., 89 Pa. St. 464; Bassall v. American Fire Ins. Co., 2 Hughes, 531.

[3] 43 Wis. 108.

[4] New York Life Ins. Co. v. Fletcher, 117 U. S. 519; Enos v. Sun Ins. Co., 67 Cal. 621; Clevenger v. Mutual Life Ins. Co., 2 Dak. 114; Simons v. New York Life Ins. Co., 38 Hun, 309; Kabok v. Phœnix Mut. Life Ins. Co. (N. Y. Sup. Ct.), 4 N. Y. Supplement, 718.

[5] Continental Life Ins. Co. v. Chamberlain, 10 Sup. Ct. Rep. 87.

[6] Girard Fire Ins. Co. v. Hebard, 95 Pa. St. 45; Shuggart v. Lycoming Fire Ins. Co., 55 Cal. 408; Thayer v. Agricultural Ins. Co., 5 Hun, 566; Walsh v. Hartford Fire Ins. Co., 73 N. Y. 5; Equitable Ins. Co. v. Cooper, 60 Ill. 509; Commonwealth Mut. Fire Ins. Co. v. Huntzinger, 98 Pa. St. 41; Hendrickson v. Queen Ins. Co., 30 Up. Can. Q. B. 108.

[7] Pitney v. Glen's Falls Ins. Co., 61 Barb. 335; Viele v. Germania Ins. Co., 26 Iowa, 9; Richmond v. Niagara Fire Ins. Co., 79 N. Y. 230; Steer v. Niagara Fire Ins. Co., 89 N. Y. 315; Cone v. Niagara Fire Ins. Co., 60 N. Y. 619; Goldwater v. L. & L. & G. Ins. Co., 39 Hun, 136; Maryland Fire Ins. Co. v. Gusdorf, 43 Md. 506; Stolle v. Ætna Ins. Co., 10 W. Va. 546; Collins v. Ins. Co., 79 N. C. 280; Westchester Fire Ins. Co. v. Earle, 33 Mich. 143; Farnum *et al.* v. Phenix Ins. Co., (Cal.) 23 Pac. Rep. 869; Van Allen v. Farmers', etc. Co., 4 Hun, 413; Gans v. St. Paul Fire and Marine Ins. Co., 43 Wis. 108; Franklin Ins. Co. v. Chicago Ice Co., 36 Md. 102; Smith v. Commercial Union Assurance Co., 33 Up. Can. (Q. B.) 69; Palmer v. St. Paul F. & M. Ins. Co., 44 Wis. 201; Baile v. St. Joseph F. & M. Ins. Co., 73 Mo. 371; McCabe v. Duchess County Mut. Ins. Co., 14 Hun, 599; Young v. Hartford Fire Ins. Co., 45 Iowa, 377; Redstroke v. Cumberland Mut. Fire Ins. Co., 44 N. J. L. 294.

[8] Boynton v. Middlesex Mut. Fire Ins. Co., 4 Met. 212; Arnet v. Mechanic's Mut. Etc. Co., 22 Wis. 516; Portage Co. Mut. Ins. Co. v. Stukey, 18 Ohio, 455; Eggleston v. Centenial Life Ass'n. 18 Fed. 14; 19 Fed. 201.

[9] 6 Gray, 185.

that parties cannot take away jurisdiction where the law has given it."[10]

Any provision of the policy which conflicts with the statutes of any State where the company is doing business, will be held, as to such State, absolutely null and void, the court holding in such cases that the statute enters into and becomes a part of the contract, and controls any conflicting provisions in the policy. As was said by the court in Fletcher v. New York Life Ins. Co.:[11] "The defendant corporation, having been permitted to do business in Missouri under the statute of the latter, was bound by all the provisions of those statutes, and could not, by the insertion of any of the many clauses of its forms of application, etc., withdraw itself from the obligatory force of the statute."[12]

The companies have had more trouble to get a satisfactory "arbitration" clause—one that would stand the test of law, than about any other clause in the policy. The "condition" has been inserted in the policy in almost every conceivable shape, only to be declared of no effect when brought before the courts. If the clause does not clearly indicate that an arbitration and award is a condition precedent to any action on the policy, then it is bad, and an action may be brought at once.[13] Or if the clause seeks to oust the courts of jurisdiction by making the award of the arbitrators final, it is not binding on the assured.[14] And so in a case of a total loss, arbitration cannot be made a condition precedent to action by the assured.[15] Arbitration must be demanded by either the assured or the company, or the condition will not be considered as binding on the assured, as a condition precedent to action. As said by the court in Wallace v. German-American Ins. Co.:[16] "If the language used leaves a question of interpretation in doubt, the construction adopted and acted upon by the assured will be sustained; that he had reasonable ground for concluding that, no arbitration being demanded, the remedy by suit was available."[17]

In those States having a "valued policy" law, the condition for arbitration is not binding on the assured in case of total loss.[18] Arbitration clauses have been upheld, but only as a condition precedent to action, and never where the question of liability was concerned. And the mode of selecting the arbitrators, and just what matters shall be submitted to them must be definitely set forth in the policy, where the policy provides that it shall not be valid unless "countersigned" by a particular agent, at a particular place, such "countersigning" is not necessary to the validity of the policy.[19] In such case the policy being delivered to the insured as a completed instrument, the company is taken to be estopped to deny its validity on this ground.

The clause forbidding "other insurance" on the property named in the policy, without the consent of the company, has also been many times held not to express the intention of the

[10] Bartlett v. Union Mut. etc. Co., 46 Me. 500; Reichards v. Manhattan Ins. Co., 31 Mo. 518; Amesburg *et al.* v. Ins. Co., 6 Gray, 696; Nute v. Hamilton Mut. Ins. Co., 6 Gray, 174; Indiana Mut. Fire Ins. Co. v. Routledge, 7 Ind. 25.

[11] 13 Fed. Rep. 526.

[12] Wall v. Equitable Life Assur. Soc., 32 Fed. 273; Vore v. Hawkeye Ins. Co., 41 N. W. Rep. 309; Day v. Dwelling-House Ins. Co., 16 At. Rep. 894; Reiner v. Dwelling-House Ins. Co., 42 N. W. 208; Sly v. Ottawa Agr. Ins. Co., 29 Up. Can. C. P. 28; Goring v. London Mut. Fire Ins. Co., 11 Ont. 82; Frey v. Mut. Fire Ins. Co., 43 Up. Can. Q. B. 102; Sauvey v. Isolated Risk & Farmers' Fire Ins. Co., 44 Up. Can. Q. B. 523.

[13] Birmingham Fire Ins. Co. v. Pulvey, 18 N. E. Rep. 804, 18 Ins. L. J. 17; Gere v. Council Bluffs Ins. Co., 67 Iowa. 272; Reed v. Washington, F. &. M. Ins. Co., 138 Mass. 572; Williams v. Hartford Fire Ins. Co., 54 Cal. 442; German-Am. Ins. Co. v. Steiger, 109 Ill. 254; Mark v. National Fire Ins. Co., 24 Hun, 565; Canfield v. Watertown Fire Ins. Co., 55 Wis. 419; L. & L. & G. Ins. Co. v. Creighton, 51 Ga. 95; Schollenberger v. Phenix Ins. Co., 7 Ins. L. J. 697.

[14] Case v. Manufacturers' F. & M. Ins. Co. (Cal.) 21 Pac. Rep. 843; German-Am. Ins. Co. v. Etherton (Neb.), 41 N. W. Rep. 406; Crossley v. Connecticut Fire Ins. Co., 27 Fed. Rep. 30; Lasher v. N. W. National Ins. Co., 18 Hun, 98; Mentz v. America Fire Ins. Co., 79 Pa. St. 478; Trott v. City Ins. Co., 1 Cliff. 439; Cobb v. New England Mut. Marine Ins. Co., 6 Gray, 192; Stephenson v. Piscataqua F. & M. Ins. Co., 54 Me. 55; Allegre v. Maryland Ins. Co., 2 G. & J. 136.

[15] Rosenwal v. Phenix Ins. Co. (N. Y. S. C.) 3 N. Y. Supplement, 215.

[16] 4 McCrary, 123.

[17] Nurney v. Fireman's Fund Ins. Co. (Mich.), 30 N. W. Rep. 350; Phenix Ins. Co. v. Badger, 53 Wis. 283; Millandon v. Atlantic Ins. Co., 8 La. 557.

[18] Thompson v. St. Louis Ins. Co., 43 Wis. 459; Thompson v. Citizens' Ins. Co., 45 Wis. 388.

[19] O'Donnell v. Confederation Life Ins. Co., 9 Canadian Law Times, 211; Meyers v. Keystone, Etc. Co., 27 Pa. St. 268; Norton v. Phœnix Ins. Co., 36 Conn. 503; Hibernia Ins. Co. v. O'Conner, 29 Mich. 241. But it has been held different in Kentucky. Lynn v. Burgoyne, 13 B. Mon. 400, and also in Louisiana. Hardie v. St. L. Mut. Life Ins. Co., 26 La. Ann. 242. And it has been held in Massachusetts that the fact that the policy was issued to the agent, does not excuse his countersigning the same. Badger v. Am. Popular Life Ins. Co., 103 Mass. 244.

company. While the cases are not at all unanimous in holding against the companies in construing this clause, yet the decided weight of authority is against them, the courts, generally, holding that by the term "other insurance," is meant other valid insurance, and that if the "other insurance" be, for any reason, invalid, it does not constitute "other insurance" within the meaning of the policy.[20] The companies now, generally have such clause to read "whether valid or not," and in this form it has met the approval of the courts, but some of the companies still retain the old form. But even where the policy contains such additional words, "whether valid or not," the policy will not be void for other insurance existing at the time it was issued, unless such other insurance continued until after the loss.[21]

Another clause which has been "lawed" out, or almost out, of the policy is the one referring to "suicide," the policy providing that it should be void "in case the insured shall die by his own hand." The courts have universally construed this clause to mean fraudulent and intentional suicide. And that where the act is unintentional and involuntary, or committed while the insured was insane, the clause did not protect the company.[22] A great many companies now have the clause to read "shall die by his own hand, whether voluntarily or involuntarily, sane or insane." In this form the clause has been upheld by the courts, and the companies granted the protection sought after in the first instance.

Perhaps the most misconstrued clause, at least from the company's stand-point, is the one refering to temperance. In most policies containing the clause, it reads: "If he shall become so far intemperate as to impair his health, or induce delirium tremens," the policy shall be void.

So far as any good this clause does the company it might just as well be left out of the policy. Intemperance being a question of fact, the failure of the companies to maintain the pleas of "intemperance" lies more with the jury than to the court, although the courts have construed it very strongly against what the companies intended. In the case of Davey v. Ætna Life Ins. Co.,[23] the charge of the court, and the evidence was as favorable to the company as it could well ask, and yet the jury returned a verdict for the plaintiff. True, the verdict was set aside, and a new trial granted in this case,[24] but a jury will more than likely return the same verdict upon another trial, and the company be held in the end. Another case resulting the same way was Miller v. Mutual Ben. Life Ins. Co.,[25] and still another, Holterhoff v. Mut. Ben. Life Ins. Co.[26] Judges Dillon and Treat, instruct-

[20] Hand v. Williamsburg City Fire Ins. Co., 57 N. Y. 41; Jackson v. Mass. Mut. Fire Ins. Co., 23 Pick. 418; Clark v. New England Ins. Co., 6 Cush. 342; Jackson v. Farmers' Mut. Fire Ins. Co., 5 Gray, 52; Hardy v. Union Mut. Fire Ins. Co., 4 Allen, 217; Gale v. Belknap Co. Ins. Co., 41 N. H. 170; Stacey v. Franklin Fire Ins. Co., 2 W. & S. 506; Mitchell v. Lycoming Ins. Co., 51 Pa. St., 402; Fox v. Phenix Fire Ins. Co., 52 Me. 333; Hubbard v. Hartford Fire Ins. Co., 33 Iowa, 325; Behrens v. Germania Fire Ins. Co., 64 Iowa, 19; Lindley v. Union Farmers' Mut. Fire Ins. Co., 65 Me. 368; Thomas v. Builders Mut. Ins. Co., 119 Mass. 121; Emery v. Mut., etc. Co., 51 Mich. 469; Jersey City Ins. Co., v. Nichol, 35 N. J. Eq. 291; Allisen v. Phenix Ins. Co., 3 Dill. 480. But in Indiana a stricter rule prevails. In American Ins. Co. v. Replogle. 114 Ind. 1, the supreme court of that State announce the rule to be: "If the policy is invalid upon its face, or if, taking it altogether, there arises from the whole instrument a presumption of its invalidity, for want of power to issue the policy in the first instance, the second policy will not constitute other insurance within the meaning of a stipulation against the insurance, and the case will fall within the rule; where, however, a policy of insurance, valid on its face, has been issued, presumably within the power of the company, and to avoid which proof of extrinsic facts is necessary, such a policy, accepted by the assured for the purpose of obtaining other or additional insurance, constitutes other insurance within the meaning of the contract, provided the policy remains outstanding and uncancelled, and was a subsisting policy of insurance at the time of the loss."

[21] Stevens v. Citizens' Ins. Co., 69 Iowa, 658.

[22] Mutual Life Ins. Co. v. Terry, 15 Wall. 580; Ins. Co. v. Rodel, 95 U. S. 232; Manhattan Life Ins. Co. v. Broughton, 109 U. S. 121; John Hancock Mut. Life Ins. Co. v. Moore, 34 Mich. 41; Breasted v. Farmers' L. & T. Co., 8 N. Y. 299; DeGorgoze v. Knickerbocker Life Ins. Co., 65 N. Y. 235; Weed v. Mut. Ben. Life Ins. Co., 70 N. Y. 561; Newton v. Mut. Ben. Life Ins. Co., 76 N. Y. 426; Penfold v. Universal Life Ins. Co., 85 N. Y. 321; Estabrook v. Union Mut. Life Ins. Co., 54 Me. 224; Hathaway v. National Life Ins. Co., 48 Vt. 335; Phadenhauer v. Germania Life Ins. Co., 7 Heisk. 567; Conn. Mut. Life Ins. Co. v. Groom, 86 Pa. St. 92; Scheffer v. National Life Ins. Co., 25 Minn. 534; Phillip v. Ins. Co., 26 La. Ann. 404; Merritt v. Cotton States Life Ins. Co., 55 Ga. 103; Life Assn. v. Waller, 57 Ga. 533; Adkins v. Columbia Ins. Co., 70 Mo. 27; Knickerbocker Life Ins. Co. v. Peters, 42 Md. 414; St. Louis Mut. Life Ins. Co. v. Graves, 6 Bush, 268; Schultz v. Ins. Co., 40 O. St. 217.

[23] 38 Fed. Rep. 650; 18 Ins. L. J. 665.

[24] 18 Ins. L. J. 811.

[25] 34 Iowa, 222.

[26] 4 Big. 395; 3 Ins. L. J. 855; Reversed by Cin. Sup Ct. in General Term; 4 Big. 375; also *see* New York Life Ins. Co. v. La Boiteaux, 5 Big. 437; May on Ins., 398, § 300; Ætna Life Ins. Co. v. Davey, 123 U. S. 739.

ing a jury, thus interpreted this clause: "The application, in answer to other questions, stated that his habits were uniformly and strictly sober and temperate, and that he did not habitually use intoxicating drinks as a beverage. These questions and answers you will perceive relate to the habits of the party in that respect. If the company did not intend to insure any person who used intoxicating liquors at all, it would be very easy to ask such a question. But they have not done so. The occasional use of intoxicating liquors by the applicant] would not make these answers untrue, nor would they be rendered untrue by any use of intoxicating drinks which did not make his habits those of a man not uniformly and strictly sober and temperate, or which did not amount to an habitual use of such drinks as a beverage."[27]

There is not a single case, wherein the company has prevailed upon this defense before a jury, and it being strictly a question of fact for the jury, it may well nigh be classed as an "inoperative clause."

If a company desires to insist on a forfeiture for failure to comply with any condition of the policy, the provision for forfeiture must be clearly expressed in the policy. All clauses of the policy requiring performance of some act on the part of the insured, which are not followed up with a condition of forfeiture for non-performance, are inoperative. Thus, where the policy required the insured to produce his account books and vouchers in case of fire, it was held that the policy was not avoided by failure or refusal to produce them, unless the policy provides in express terms for such forfeiture.[28] And so it was held that a refusal to charge as to the effect of other insurance is proper where the policy contains no provision avoiding it for such reason.[29] The discontinuance of a steam-pump and hose for extinguishing fires, will not avoid the policy, there being no provision for it in the policy.[30]

The non-payment of a premium note at maturity in the absence of a provision for forfeiture will not avoid the policy, and so of interest on such note,[31] and so the removal of personal property from the usual depository will not avoid the policy, although described in the policy as "contained in" a certain building,[32] there being no provison avoiding it in such case, and so a contract for the sale of insured property will not avoid the policy under a provision avoiding it if the property "be sold or any change taken place in the title or possession."[33]

In life insurance it has been held many times that a surrender of the original policy was not necessary to secure to the assured the benefit of the paid-up insurance provided for in the policy.[34] There must be no room for doubt in a clause of forfeiture. If there is the slightest ground for holding the contract good, it will be done.

It may be remarked in conclusion that the conditions of a policy, for the defense of the company, are exceedingly fragil, even at best, when affected by the wide sweeping law of estoppel and waiver. For no matter how impregnable a policy may be in its wording, nor how clear the infraction of the conditions, if

[27] Swick v. Home Life Ins. Co., 2 Del. 160; 2 Ins. L. J. 415.

[28] Lion Fire Ins. Co. v. Starr (Tex.), 12 S. W. Rep. 45.

[29] Agricultural Ins. Co. v. Bemiller (Md.), 17 At. Rep. 380.

[30] Brighton Mfg. Co. v. Ins. Co., 33 Fed. Rep. 282.

[31] New England Mut. Life Ins. Co., v. Hasbrook, Admr., 32 Ind. 447; Kline v. National Ben. Assn., 111 Ind. 466; Symonds v. N. W. Mut. Life Ins. Co., 23 Minn. 491.

[32] McCluer v. Girard Fire Ins. Co., 43 Iowa, 349; Fitchburgh R. R. v. Charleston Mut. Fire Ins. Co., 7 Gray, 64; London & Lancashire Fire Ins. Co. v. Graves, 12 Ins. L. J. 308; Longueville v. Western Assur. Soc. 51 Iowa, 551. But the courts are not unanimous in thus holding. The following cases holding otherwise: Annapolis, etc. R. R. v. Baltimore Fire Ins. Co., 32 Md. 37; Lycoming Ins. Co. v. Updegraf, 40 Pa. St. 311; Harris v. Royal Canadian Ins. Co. (Iowa), 8 Ins. L. J. 525; English v. Franklin Fire Ins. Co. (Mich.), 21 N. W. Rep. 340.

[33] Kempton v. State Ins. Co., 62 Iowa, 83; May on Ins. (2d ed.), 352, § 272; Strong v. Mfrs. Ins. Co., 10 Pick. 40; Trumbull v. Portage Co. Mut. Ins. Co., 12 Ohio, 305; Tittemore v. Vermont Mut. Fire Ins. Co., 20 Vt. 546. The cases holding thus are too numerous for full citation. The above, however, will be sufficient to show the rule prevailing.

[34] Mound City Mut. Life Ins. Co. v. Twining, 12 Kan. 475; St. Louis Mut. Life Ins. Co. v. Grigsby, 10 Bush, (Ky.) 310; Montgomery v. Phœnix Mut. Life Ins. Co., 14 Bush, 51; Johnson v. Southern Mut. Life Ins. (Ky.) 9 Ins. L. J. 189; 79 Ky. 403; Lovell v. St. Louis Mut. Life Ins. Co., 111 U. S. 264; Chase v. Phœnix Mut. Life Ins. Co., 67 Me. 85. Some courts have held that a surrender within the time named in the policy is necessary in order to secure the paid up insurance. Bussing v. Union Mut. Life Ins. Co., 34 Ohio St. 222; Knapp v. Homeopathic Mut. Life Ins. Co., 117 U. S. 411; Sheerer v. Manhattan Life Ins. Co., 20 Fed Rep. 886; Smith v. National Life Ins. Co. 103 Pa. St. 177, and other cases. The weight of authority seems to hold that a surrender, if provided for in the policy, must be made in accordance with the terms thereof.

the company, having knowledge of such infraction, takes any step, through any of its managing agents, that is not wholly compatible with an intention to resist payment, because of such infraction, it will be held to have waived its right to so defend, or to be estopped from setting up such defense. Upon this the citation could be general, the rulings being nearly unanimous, and established past possibility of reversal.

JOHN A. FINCH.

Indianapolis, Indiana.

MUNICIPAL CORPORATIONS — NEGOTIABLE PAPER.

NEUGASS V. CITY OF NEW ORLEANS.

Supreme Court of Louisiana, February 10, 1890.

1. *Municipal Corporations — Powers — Money — Notes.*—Municipal corporations cannot borrow money nor issue negotiable securities without express legislative sanction or irresistible implication.

2. *Municipal Corporations—Certificates of Indebtedness.*—Certificates of indebtedness issued by city officials to its creditors are not commercial or negotiable paper.

BERMUDEZ, C. J.: The question to be determined in this case involves the right of the plaintiffs to recover from the city of New Orleans as holders of certain certificates of indebtedness issued by the comptroller and mayor, in the name of the city, under a certain ordinance, in favor of parties named therein or bearer, and which on their face purport to be evidences of liability; in other words, whether such vouchers can be assimilated to ordinary promissory notes, State or municipal bonds, and such as can be recovered upon by holders in good faith and for value, etc. Substantially, the answer is a denial of ownership in plaintiff and of the right to sue, and a declaration of the worthlessness of the instruments, and the assertion, under any contingency, of the right of settling up, equally destructive of the rights of plaintiff. From a judgment of dismissal plaintiffs appealed.

In April, 1881, and in June, 1883, ordinances Nos. 6968 A. S. 347 C. S. were adopted by the city council of New Orleans, authorizing the issuance of certificates of indebtedness to certain creditors of the city, to be signed by the comptroller and the mayor. They are to the effect: (1) that any creditor of the city to whom an appropriation has been made, but in whose favor the comptroller cannot draw a warrant until there be money in the treasury, to the credit of the appropriate amount, not otherwise appropriated, shall be authorized upon demand to receive a transferable certificate of ownership entitling him or bearer to receive a cash warrant; (2) that the creditor shall sign a receipt therefor, stipulating that the cash warrants shall be claimed only on the surrender of the certificate, and the acceptance of the warrants shall be an acceptance of the conditions of the ordinance; (3) that the warrants shall issue strictly in the order of the appropriating ordinance; (4) that the certificate shall not novate or affect the nature of the claim, but shall be simply an evidence of transferable ownership; (5) that the certificate shall state upon its face the nature and effect of its issue, with numbers, dates, and names, and that upon its reverse the ordinance shall be printed.

Ordinance 374 C. S. contains the form of the certificate mentioned in it, and which reads as follows: "Office of the Comptroller. Certificate of Ownership of Appropriation. issued under ordinance No. 347 C. S., approved 26th June, 1883. New Orleans, ——, 188-. This is to certify that under ordinance No. ——, adopted ——, 188-, the sum of $—— has been appropriated to —— for and on account of ——, and the said —— or the bearer hereof shall upon the surrender of this certificate, and not otherwise, be entitled to receive in the order of the promulgation of said ordinance a cash warrant on the treasurer, or any fund in the treasury to the credit of the appropriate fund, and not otherwise appropriated. It is herein specially agreed to by the holder of this certificate that it bears no interest, and shall not novate, nor in any manner affect, the nature of the claim against the city under the ordinance referred to, but shall be simply an evidence of transferable ownership thereof; and whenever the ordinance, or that portion of it to which this certificate applies, is paid or canceled by being tendered and received in payment of taxes when authorized by law, then this certificate shall be surrendered to the office of the comptroller. ——, Comptroller. ——, Mayor." The certificates sued on are in that form, and bear on their reverse a copy of the ordinance. Naturally, the blanks are filled up.

The right of municipal corporations to borrow money, and to issue negotiable securites, has frequently been questioned; and, although judicial adjudications on the subject may have considered it from different stand points, recognizing or denying it according to circumstances, it may now be admitted as settled that they can do neither without express legislative sanction, or irresistible implication. After reviewing all the authorities on the subject, Mr. Dillon says that he "regards it as the true doctrine that, as incidental to the discharge of its ordinary corporate functions, no municipal or public corporation has the right to invest any instrument it may issue, whatever its form, with that supreme and dangerous attribute of commercial paper which insulates the holder for value from equities which attach to its inception:" and he adds that "this point should be guarded by the courts with the utmost vigilance." Mun. Corp. § 126. "The consequences of recognizing

such a power, in the extravagance it will stimulate, in the frauds it will engender, and in the ruinous indebtedness it will inevitable produce, are alarming to contemplate." *Id.* § 125, par. 2. Further on he says that, although warrants or orders negotiable in form may be made by the proper municipal officers, and in many States may be transferred by delivery or indorsement, and the holder may sue thereon, yet they are not commercial or negotiable paper in the hands of holders, which exclude inquiry into the legality of their issue, or preclude defense thereto. They are not bills of exchange. Section 487. "Such warrants or orders * * * are not intended to have the qualities of negotiable paper, but are instruments authorized for convenient use in conducting the current and ordinary business of the corporation, and as a means of anticipating its ordinary revenue. It would overwhelm municipalities with ruin to hold that * * * they protect an innocent holder for value from defenses of which he has no notice, actual or constructive. All holders of such warrants or orders, even when payable to order, or bearer, stand in the shoes of the payee; and the rights and remedies are essentially different from those of the holders of authorized negotiable municipal bonds. Such is the sound doctrine, and such the authorities, almost without exception." Section 503.

In case of Mayor v. Ray, 19 Wall. 477, it was said that vouchers for money due, certificates of indebtedness for services rendered or for property furnished for the uses of the city, orders or drafts drawn by one city officer upon another, or any other device of the kind used for liquidating the amounts legitmately due to public creditors, are, of course, necessary instruments for carrying on the machinery of municipal administration, and for anticipating the collection of taxes; but to invest such documents with the character and incidents of commercial paper, as to render them, in the hands of *bona fide* holders, absolute obligations to pay, however irregularly or fraudulently issued, is an abuse of their true character and purpose. It has the effect of converting a municipal corporation into a trading company, and puts it in the power of corrupt officials to involve a political community in irretrievable bankruptcy. No such power ought to exist, unless conferred by legislative enactment either express or clearly implied. Every holder of a city order or certificate knows that, to be valid and genuine at all, it must have been issued as a voucher for city indebtedness. It could not lawfully issue for any other purpose. He must take it, therefore, subject to the risk that it has been lawfully and properly issued. His claim to be a *bona fide* holder will always be subject to this qualification. The face of the paper itself is notice to him that the vilidity depends upon the regularity of its issue. The officers of the city have no authority to issue it for any illegal or improper purpose; and their acts cannot create an estoppel against the city itself, its tax-payers or people. Persons receiving it from them know whether it issued, and whether they receive it, for a purpose and a proper consideration. Of course, they are affected by the absence of these essential ingredients, and all subsequent holders take the same, and are affected by the same defect. This ruling is in perfect accord with what the same court had shortly before held. See Police Jury v. Britton, 15 Wall. 566. See, also, Parsons v. Monmouth, 70 Me. 262.

In this State, instruments of such character have been declared not to be commercial or negotiable paper. Board v. Hernandez, 31 La. Ann. 161; State v. City, O. B. 51, fol. 289; State Lusher, O. B. 50, fol. 571. It is therefore patent that, whatever may be the form of the certificates sued on, they are not negotiable and transferable, as is claimed by the plaintiff. A simple inspection of them suffices to justify this conclusion. They are instruments consisting of face and reverse, which must be read as one in each instance. Although they purport to be certificates of indebtedness in favor of creditors of the city, in whose favor an appropriation has been made by a designated ordinance, they are not unconditional obligations to pay money. They refer to the ordinance under which they were prepared, and which, printed on the back, forms part of them. They give the name of the creditor entitled to receive same, whose name must be on the city's books. They show that they cannot be altered unless the receipt mentioned in the ordinance be first given. They are simply, under the terms of the ordinance, evidence of transferable ownership. They do not call for money or presentation. They fix no time for maturity. They are merely convertible into a cash warrant, and subjected to other contingencies useless to specify. They are not indorsed by the party whose name they contain, or by any agent or transferee of him. They are not even conditional obligations to pay any amount. How, then, can it be claimed with any sincerity that they can be assimilated to ordinary notes and bonds?

For the purposes of this controversy, it is immaterial how they left the hands of the city officials who signed them—whether fraudulently or otherwise—and whether the plaintiff is or not holder in good faith, for value, and in due course of business. From the very language of the ordinance, which forms part of them, they could not have been altered by the city officers authorized to enact them, unless the parties to whom they accrued had previously signed therefor, as a condition precedent for delivery, a specific receipt, containing certain stipulations, as part of a new contract. There is no evidence that such receipt was ever signed by the parties named in the certificates, their agent or transferee, so that, even if the certificates were obligations to pay, which they are not, their emission to the creditor could have vested title in him only on his signature of the receipt; and this formality having been im-

posed as a prerequsite by the ordinance printed on the back of the certificates, and forming part thereof, and not having been observed, the ownership of the certificates could not pass the plaintiff. To all intents and purposes, these certificates are, in legal contemplation, still in the possession of the city, subject to the order or receipt of such parties, their agent or transferee; so much so that if the city were to satisfy the demand of plaintiff, the original parties might have cause to complain, and to require another payment to themselves.

Surely the plaintiff in this case has no greater rights than the parties whose names the certificates bear. Conceding that those parties have either signed the receipt in question, or indorsed over the certificate in blank to the plaintiff, it does not follow that the plaintiff would be entitled to the money judgment which he seeks, for the obvious reason that the parties named in the certificates could not themselves have obtained it, inasmuch as, under the ordinance which forms part of the certificate, all that the creditor could claim would be a warrant on the treasurer to be paid out of the appropriate fund in the city coffers in the order stated in the ordinance. The demand is not for any such warrants; and, if it were, it could not be allowed, as there is no evidence that there is money in the treasury appropriated to the payment of the debt or claim for which the warrant would have issued.

Judgment affirmed.

NOTE.—The authorities agree that municipal corporations have such powers only as are expressly granted and such incidental ones as are necessary to make those powers available and are essential to effectuate the purposes of the corporation.[1] They differ, however, in their decisions as to what powers are incidental. Borrowing money does not seem necessary for carrying on a municipality, consequently a municipality has no such power unless it has been specifically granted.[2] So the power to make and alter commercial paper of any kind is denied to them, unless such power is expressly conferred upon them by law or clearly implied from some power expressly given, which cannot fairly be exercised without it.[3] The power to issue bonds requires such express authority,[4] and it is required before money can be borrowed.[5] A city was authorized to pass ordinances to establish and maintain free schools, purchase building sites and construct school houses. The power to borrow money or to create a debt was not considered to be a necessary incident of the power to buy grounds and build school houses, and the bonds issued to pay for land and buildings, bought for school purposes, were held to be void.[6] Where a city was authorized to issue bonds to purchase sites for public buildings, and to erect suitable buildings thereon, and to purchase sites for school houses, its bonds issued to erect school houses were declared void. This decision, however, was partly based on the fact that a prior law, which specifically authorized the issue of such bonds for school houses, as well as public buildings, had been repealed.[7] A municipal corporation cannot subscribe to the stock of a railroad corporation unless the legislature has expressly conferred such power upon it,[8] nor can it issue bonds without a similar authority,[9] nor does the grant of power to make such subscription carry with it the power to issue negotiable bonds in payment of the subscription, unless the power to issue such bonds is expressly or by reasonable implication conferred by statute. If no means of paying the subscription is provided for, such payment cannot be made by issuing negotiable bonds.[10] It is not considered to be necessary that such power should be directly given. Such authority may be inferred from special and extraordinary powers, which require the expenditure of unusual sums of money, when it is usual to execute such powers by means of borrowing, and when upon the whole legislation applicable to the municipality such appears to have been the legislative intent.[11] The courts, holding these views, consider that such power would be attended with abuse and fraught with danger, and therefore it ought not to be upheld.[12] Other courts, however, maintain that the fact that the power may be abused is no argument to prove the non-existence of the power, but may be a reason why the legislature should withhold the power.[13] It has been held that where a municipality has lawfully created a debt, it has the implied power, unless restrained by its charter or statute, to evidence the same by bill, bond or other instrument. The power to contract the debt implies the right to issue the proper acknowledgment therefor. The power of a municipal corporation to borrow money and issue bonds depends upon the fact whether the expenditure be for purposes authorized by its charter and made necessary and proper by its corporate duties.[14] In this case a distinction is drawn between municipal corporations and other public corporations, it being considered that the former require more extended powers in order to perform their duties. Where a city was authorized to construct and keep in repair culverts, drains and sewers, its bonds issued for the purpose of aiding in the construction of sewers were held to be valid.[15] In a number of cases, where public corporations were authorized to embark in undertakings, which required money, it was held that they could issue bonds therefor or give their notes, and that it was immaterial whether they paid their creditors by borrowing the money from others on their bonds.[16] Where the debt is lawfully contracted, the municipality can agree to pay therefor in any mode.[17] The views, however, of Judge Dillon, as stated in the principal case, seem to be sustained by the weight of authority, and are in consonance with the present drift of opinion in favor of restraining the powers of public corporations.

1 Clarke v. City of Des Moines, 19 Iowa, 199.
2 Hackettstown v. Swackhamer, 37 N. J. L. 191.
3 Concord v. Robinson, 121 U. S. 165; Claiborne County v. Brooks, 111 U. S. 400.
4 Katzenberger v. Aberdeen, 121 U. S. 172.
5 Mayor v. Ray, 19 Wend. 465.
6 Waxahachie v. Brown, 67 Tex. 519.
7 State v. Bayonne, 49 N. J. L. 308.
8 Kelley v. Milan, 127 U. S. 139.
9 Jefferson County v. Hawkins, 23 Fla. 223.
10 Kelley v. Milan, 127 U. S. 139; Norton v. Dyersburg, 127 U. S. 160.
11 Gause v. City of Clarksville, 5 Dill. 165.
12 Clark v. City of Des Moines, 19 Iowa, 199.
13 City of Williamsport v. Com., 84 Pa. St. 487.
14 *Idem.*
15 State v. Babcock, 22 Neb. 614.
16 State v. City of Madison, 7 Wis. 688; Mills v. Gleason, 11 Wis. 493; Wyandotte v. Zietz, 21 Kan. 649; Clarke v. School Dist., 3 R. I. 199; Bank of Chillicothe v. Chillicothe, 7 Ohio, 354; State v. Babcock, 25 Neb. 278.
17 City of Galena v. Corwith, 48 Ill. 423.

All the authorities agree with the principal case in holding that a municipality may issue its note or certificate as a voucher of indebtedness, but those which deny the power to issue bonds or negotiable paper maintain that such vouchers are subject to all equitable defenses, though they may have been transferred prior to maturity.[18] S. S. MERRILL.

[18] Hackettstown v. Swackhamer, 37 N. J. L. 191; Douglas v. Virginia City, 5 Nev. 147; New Albany Bank v. Danville, 60 Ind. 504; Mullarky v. Cedar Falls, 19 Iowa, 21; City of Galena v. Corwith, 48 Ill. 423; Clark v. School Dist., 3 R. I. 199.

HUMORS OF THE LAW.

A barrister was defending a man who was tried on a charge of manslaughter. The accused acknowledged his guilt.

"Then there's an end of the case," said the judge.

"How so, my lord?" inquired the counsel for defense.

"The man acknowledges that he is guilty," replied the judge.

"That may be," added the barrister; "but I don't acknowledge anything of the kind."—*Green Bag.*

Not long since I happened to meet a young man who had just been admitted to the bar, and he called attention to the fact by saying: "Well, I've got my shingle out." "Glad to hear it; wish you every success," I replied, and passed on. That afternoon the young man came into my sanctum. "Look here," said he; "it occurred to me that you might think I spoke to you of my admission to the bar with the desire that you would mention it in your paper." "Oh, no; I had no such thought. I know your modesty about such things." "Well," he said "I was afraid you might, and I thought I would just run up and ask you not to say anything about it." I pledged myself not to say a word. "Because," he added, "I think it very bad form to be eternally button-holing some newspaper man to get a puff out of him. Don't you? I said I quite agreed with him. "Although, I suppose," he continued, meditatively, "it doesn't do a yonng man any harm to have his name before the public occasionally." "Especially a young professional man," I suggested. "Well, that's so," he admitted. "It is pretty hard pulling through at first for a young lawyer; but still, if he studies hard, and the people hear a good deal about him in one way or another, most any attorney of ordinary ability can work up a practice. Don't you think so?" I did and told him so. "A good deal," he went on, "in fact almost every thing depends upon a man's keeping his name before the public right along. Ain't that so?" Of course I agreed to that. "Some little thing like this for instance: 'Young Mr. Brown, son of one of our foremost citizens, has developed into a lawyer of brilliant promise, and is rapidly acquiring a lucrative practice.' I say a little thing like that in your paper wouldn't do a fellow any harm. Do you think it would?" I made no reply, but handed him a neatly printed card containing our regular rates for advertising. He studied it thoughtfully for a moment, then took his hat and walked away without saying a word.—*Texas Siftings.*

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ACCOUNT STATED.—Where a claim or demand for money arises out of contract, either express or implied, and is for something furnished or performed by one party for another, but is not founded upon a promissory note or other instrument in writing, and a statement of such claim or demand is made out in detail and in writing by the claimant or demandant, and presented to the other party, such statement constitutes an account, within the meaning of section 84 of the justices' act, and section 108 of the Civil Code.—*Southern Kan. Ry. Co. v. Gould*, Kan., 24 Pac. Rep. 352.

2. APPEAL—Joint Judgment.—All the defendants in a joint judgment are necessary parties to a petition filed by one of them to reverse it, and may be made so, as plaintiffs or defendants, in conformity to the provisions of sections 40, 41, and 42 of the Code, as to parties to civil actions.—*Curtin v. Atkinson*, Neb., 46 N. W. Rep. 91.

3. ASSIGNMENT FOR BENEFIT OF CREDITORS.—Under Gen. Laws Tex. 1883, p. 47, which requires an assignee to give bond for the faithful discharge of his duties, and provides that creditors may sue for breach of such bond—where an assignee abandons the entire assets to one creditor, and leaves the State, a creditor may sue the assignee and his sureties to recover the value of the assets, and to have a new assignee appointed.—*Becker v. Shayne*, Tex., 13 S. W. Rep. 1027.

4. ASSIGNMENT FOR BENEFIT OF CREDITORS.—The use of the corporate seal being necessary to convey land, under Rev. St. Tex. art 600, an assignment by a corporation for the benefit of creditors, purporting to convey all its property, real and personal, is invalid without the seal, though the inventory shows only personality.—*Shopshire v. Behrens*, Tex., 13 S. W. Rep. 1043.

5. BASTARDY—Justice of the Peace.—The proceedings before a justice of the peace under the bastardy act, where a person is charged with being the father of an illegitimate child, are of a preliminary nature; and the adjudication of the justice of the peace discharging the defendant is no bar to a subsequent complaint and hearing before the same or another justice upon the same charge.—*In re Parker*, Kan., 24 Pac. Rep. 338.

6. CARRIERS—Passenger.—A railroad company is liable to a passenger for slight negligence, and is bound to furnish a reasonably safe and sufficient track, rolling stock, and service, so far as can be provided by the utmost human skill, diligence, and foresight, which

is such skill, diligence, and foresight as is exercised by a very cautious person; but it does not insure safety.—*Furnish v. Missouri Pac. Ry. Co.*, Mo., 13 S. W. Rep. 1044.

7. CARRIERS OF GOODS.—Under Act. Ark. Feb. 27, 1885, § 3, providing that a railroad company refusing to deliver freight at its destination upon payment or tender of the charges due by the bill of lading shall be liable to a penalty, the entire charges must be paid or tendered in order to fix the liability.—*St Louis, A. & T. Ry. Co. v. Johnson*, Ark., 13 S. W. Rep. 1996.

8. CONFISCATION.—Proceedings under the act of congress of July 17, 1862, to condemn andconfiscate property, when consummated did not divest the fee or naked ownership which continued to dwell in the confiscatee. Nothing beyond the life-estate or usufruct passed to the adjudicatee.—*Citizens' Bank v. Hyams*, La., 7 South. Rep. 700.

9. CONSTITUTIONAL LAW—Taxation.—Section 12 of Act 101 of 1886, the license law of that year, which provides an annual license for every individual carrying on the business or profession of master builder, or mechanic who employs assistance, does not contravene the provisions of article 206 of the constitution, which exempts from the payment of a license tax those who are employed in mechanical pursuits.—*Theobalds v. Conner*, La., 7 South. Rep. 689.

10. CONTRACT—Burden of Proof.—In an action for breach of a contract to "harden and temper, in a workman-like manner," certain blades, the burden is on the plaintiff to establish that the materials used in their manufacture were of such quality that the blades could by proper treatment have been efficiently tempered and hardened.—*Hood v. Disston*, Ala., 7 South. Rep. 732.

11. CONTRACTS—Consideration.—Defendant's testator guarantied, by writing not under seal, the payment of plaintiff's execution against third persons. Subsequently, in consideration of plaintiff's extending the time, he executed a promise under seal to absolutely pay the amount for which the execution debtors were liable; but this latter promise was not for as much as the first guaranty. *Held*, that there was a consideration for the promise under seal, and that an action on it was not barred for 20 years.—*Jones v. Sikes*, Ga., 11 S. E. Rep. 664.

12. CONTRACTS—Gambling.—Contracts between customers and commission merchants or stock speculators, which consist of bets and wagers on the future rise and fall in the price of petroleum, grain, provisions, and stocks, by means of purchases or sales which do not contemplate a delivery, followed by periodical settlements of differences between the agreed and the market prices, are within the purview of Gen. St. Ky. ch. 47, art. 1.—*Lyons v. Hodgen*, Ky., 13 S. W. Rep. 1076.

13. CORPORATIONS—Dissolution.—Under Code Ga. § 1688 providing that on dissolution of a corporation the superior court may appoint a receiver properly to administer the assets of the corporation under its direction, a receiver thus appointed pending an action on behalf of the corporation brought by its treasurer, is entitled to be made a party plaintiff to such action.—*Houston v. Redwine*, Ga., 11 S. E. Rep. 662.

14. CORPORATIONS — Stock — Subscriptions.—A subscription to the capital stock of a railroad company, the payment of which is made dependent upon the completion of a part of its road, may be enforced against the subscriber after the company has fully complied with its conditions, although, when the subscription was made, the company had not expended 10 per centum of its authorized capital in the construction of its road, nor obtained actual, *bona fide* subscriptions to its capital stock to the amount of 20 per centum thereof.—*Armstrong v. Karshner*, Ohio, 24 N. E. Rep. 897.

15. CORPORATIONS DE FACTO.—Where the law authorizes a corporation, and an effort is made in good faith to organize a corporation under the law, and therefore, as a result of such effort, corporate functions are assumed and exercised, the organization becomes a corporation *de facto*, and private persons, who deal with it as a corporation, cannot be permitted to say, with regard to those dealings, that it was not a corporation *de jure* because some legal formality, not important for their substantial rights, had not been complied with.—*Vanneman v. Young*, N. J., 20 Atl. Rep. 53.

16. COUNTIES—Care of Insane.—A contract between the board of county commissioners in Indiana and the guardian of an insane ward, that the guardian will pay the county, out of the ward's estate, a certain compensation for the care and support of the ward in the county asylum provided for the poor, cannot be enforced, the county asylum being a charitable institution.—*Board of Commissioners v. Ristine*, Ind., 24 N. E. Rep. 990.

17. COUNTY BOARD—Powers.—In the absence of any statutory authority therefor, the county commissioner cannot contract with the county auditor, on behalf of the county, that he shall receive compensation which is not provided for by statute.—*Lee v. Board of Commissioners*, Ind., 24 N. E. Rep. 986.

18. COUNTY-SEAT—Location.—Where an election has been held for the permanent location of the county-seat in a newly-organized county, and the returns made, and such vote has been duly canvassed by the board of county commissoners, and the place receiving a majority of all the votes cast has been proclaimed by said board the permanent county-seat, and no proceedings instituted to test the validity of such election, the sheriff of said county has no authority to issue a proclamation for a second county-seat election in said county; and all proceedings thereunder are void.—*Brown v. State*, Kan., 24 Pac. Rep. 845.

19. CRIMINAL CONVERSATION—Condonation.—The husband's right to recover against his wife's seducer is not barred by his continuing to live with her after knowledge of her infidelity.—*Sikes v. Tippins*, Ga., 11 S. E. Rep. 663.

20. CRIMINAL LAW—Murder.—On an indictment for murder, where the only issue is whether the killing was done in self-defense, an instruction that defendant was guilty of manslaughter if he intentionally fired off his pistol, and accidentally and carelessly, and not in self-defense, killed deceased, is misleading and erroneous.—*Crane v. Commonwealth*, Ky., 13 S. W. Rep. 1079.

21. MURDER—Malice.—Ordinarily when the act is deliberately committed with a deadly weapon, and is likely to be attended with dangerous consequences, the malice requisite to murder will be presumed. But, as a general rule, it has been held that the presumption which arises from a killing, unconnected with such circumstances of violence, is that of murder in the second degree only.—*State v. Deschamps*, La., 7 South. Rep. 703.

22. CRIMINAL PRACTICE—False Pretenses.—An indictment charging that the defendant falsely and fraudulently represented that he was the owner of certain lots, etc.; that the prosecuting witness, relying on the truth of the statements, accepted a deed thereof, paying a large amount of money and property, (stating amount), and that defendant knew the representations were false—sufficiently charges the crime of obtaining property under false pretenses, under Pen. Code Cal. § 532.—*People v. Hamberg*, Cal., 24 Pac. Rep. 298.

23. CRIMINAL PRACTICE—Larceny.—Failure to set out in an indictment for larceny the Christian name of one of two persons therein alleged to have been joint owners of the stolen property is not ground for quashing the indictment.—*State v. Riley*, Mo., 13 S. W. Rep. 1063.

24. DAMAGES—Wrongful Detention.—Plaintiff, the maker of a newly-patented machine, put up a certain number of the machines in defendant's factory, under an agreement whereby, at the end of a certain period, defendant was to have the option of returning the machines, or of purchasing them at a price based upon the saving to defendant from the use of the machines.

Held that, defendant having wrongfully detained such machines after the close of the trial period, plaintiff's damages for such detention was the interest on the value of the machines from the time of demand.—*Redmond v. American Manuf'g Co.*, N. Y., 24 N. E. Rep. 924.

25. DEATH BY WRONGFUL ACT.—Gen. St. Ky. ch. 57, § 3, provides that, if the life of any person is lost by the willful neglect of another person, company, or corporation, then the widow, heir, or personal representative of deceased shall have the right to sue, etc. *Held*, that the word "heir," in such section, is equivalent only to "child," and hence no right of action exists in favor of the father of deceased.—*Louisville & N. R. Co. v. Coppage*, Ky., 13 S. W. Rep 1086.

26. DEEDS—Delivery.—In order to pass the title to land by conveyance, there must be such an actual or constructive tradition of the deed from grantor to grantee as puts it beyond control of the former, and it must be accompanied by an intention to pass the title at once.—*Martling v. Martling*, N. J., 20 Atl. Rep. 41.

27. DEED—Sheriff.—A foreclosure decree and sheriff's deed for a certain tract of land, "except such portion as has been laid out in town lots, and sold prior to the execution of the mortgage," without showing which lots had been so sold, are void for uncertainty, since such a deed cannot be aided by extrinsic evidence.—*Bowen v. Wickersham*, Ind., 24 N. E. Rep. 983.

28. DUELING—Disfranchisement.—Under Const. Tenn. art. 9 § 3, which provides that any person who shall fight a duel, or be an aider and abettor in fighting a duel, shall be deprived of the right to hold office, and shall be punished as the legislature may prescribe, a citizen of Tennessee is not disqualified from holding office by the fact that he acted as second in a duel fought in Arkansas between two citizens of Tennessee, where it is not shown that he did any act in regard to the duel, or even knew that it was impending, while he was in the State of Tennessee.—*State v. Du Bose*, Tenn., 13 S. W. Rep. 1088.

29. EASEMENT—Right of Way.—Where the purchaser of land buys it with the parol understanding that a strip of land adjoining it is to be reserved for an alley, such understanding forming a part of the consideration for the purchase, his continued and uninterrupted use of it as an alley, under claim of right, for more than 20 years, gives him right of way by prescription.—*McKinzie v. Elliott*, Ill., 24 N. E. Rep. 965.

30. EQUITY—Bill.—A bill to reform a deed which complainant had supposed conveyed her the fee, but which in reality only gave her a life-estate, and also to set aside a trust-deed on the same land which she had executed for the purpose of making a settlement on her husband and children, but without understanding its effect, is bad for multifariousness, as the trustee has no concern with the reformation of the first deed.—*Van Houten v. Van Winkle*, N. J., 20 Atl. Rep. 34.

31. EQUITY—Cancellation of Contracts.—A contract will not be set aside merely because of a disparity, though great, between the parties negotiating it, in respect of education, business training, and ability. When such disparity appears, the contract will be scrutinized with extreme care, but will not be avoided unless the circumstances show that it was procured from the weaker party by an artifice or deception, or by undue pressure or importunity.—*Dundee Chemical Works v. Conner*, N. J., 20 Atl. Rep. 50.

32. EQUITY—Setting Aside Deed.—Where a person arrested for larceny conveys land to the person causing his arrest in satisfaction for the stolen property, the fact that, after being released from arrest and having consulted with counsel, he surrendered possession of the property conveyed, constitutes a ratification of the conveyance.—*Eberstein v. Willets*, Ill., 24 N. E. Rep. 967.

33. EMINENT DOMAIN—Damages.—On the trial of an appeal from the award of commissioners, made in condemnation proceedings for a right of way for a railroad company, it is error for the trial court to instruct the jury that they may take into consideration, as tending to depreciate the market value of the land through which the right of way is located, the damages for stock liable to be killed by moving trains, and for fires liable to be set out by locomotives, passengers, and employees, without making any distinction between what may be negligently done, and what may occur accidentally and without negligence.—*Chicago, K. & W. R. Co. v. Palmer*, Kan., 24 Pac. Rep. 342.

34. EMINENT DOMAIN—Damages.—It is an established rule in the condemnation of lands that the just compensation which the land owner is entitled to receive for his land and damages thereto must be limited to the tract a portion of which is actually taken.—*Currier v. Waverly & N. Y. B. R. Co.*, N. J., 20 Atl. Rep. 57.

35. EVIDENCE.—Secondary evidence of the contents of a letter addressed to plaintiff is admissible on testimony of his daughter that she took charge of it when received; that she was in charge of the house, and did all the business in caring for her parents, who were very old; that she had searched the house for the letter before coming to the trial, and could not find it; and that she supposed it was among some letters she destroyed some time ago, there being nothing to show that it was willfully destroyed.—*Henry v. Diviney*, Mo., 13 S. W. Rep. 1057.

36. EXECUTIVE SALE—Relief.—Where an undivided one-fifth interest in 160 acres of land, worth $1,500, is sold *en masse* to satisfy a judgment for $46 and costs, and bought by the judgment creditor, and it appears that the judgment debtor had no notice of the suit, and that the affidavit for publication incorrectly stated his residence, a bill to redeem from such sale will lie, even after the execution of the sheriff's deed.—*Smith v. Huntoon*, Ill., 24 N. E. Rep. 971.

37. EXECUTORS AND ADMINISTRATORS.—Under Rev. St. Ill. 1889, ch. 3, § 80, which provides that, if any executor or administrator shall make affidavit that he believes that any person has property or evidences of debt belonging to the deceased, the county or probate court shall cite such person to appear, shall hear evidence, and make such order as the case may require, an executor who, after filing such an affidavit, finds that he was misinformed, may file an amendment affidavit.—*Blair v. Sennott*, Ill., 24 N. E. Rep. 969.

38. EXEMPTIONS—Statutes.—A merchant's stock in trade is included in Gen. St. Colo. ch. 609, § 32, which exempts from levy and sale under execution or attachment the tools, implements, working animals, books, and stock in trade not exceeding $300 in value, of any mechanic, miner, or other person not the head of a family.—*Martin v. Bond*, Colo., 24 Pac. Rep. 326.

39. FALSE REPRESENTATIONS—Fraudulent Issue of Stock.—The fraudulent signing and issuing, by the president and treasurer, of certificates of stock in a foreign corporation, invalid by reason of acts and omissions of the officers, and marked "non-assessable," though nothing had been paid thereon, constitutes actionable false representations to a subsequent *bona fide* purchaser.—*Windram v. French*, Mass., 24 N. E. Rep. 914.

40. FEDERAL COURTS—Jurisdiction.—Under Act. Cong. March 3, 1875, § 8, which is expressly left in force by amendatory Act. Cong. Aug. 13, 1888, the circuit court has jurisdiction of a suit by a resident of another district to foreclose a mortgage on land situated within the district, though some of the defendants are, and others are not, residents of the district in which the suit is brought.—*Ames v. Holderbaum* (U. S. C. C.), Iowa, 42 Fed. Rep. 341.

41. FEDERAL COURTS—Jurisdiction.—Rev. St. U. S. § 737, does not give the circuit court jurisdiction of a suit to foreclose a mortgage given by an executor under a power in the will on land devised to testator's children, where some of the devisees are non-residents, and are neither made parties defendant, nor appear to answer.—*Detweiler v. Holdenbaum* (U. S. C. C.), Iowa, 42 Fed. Rep. 357.

42. FORMER JEOPARDY.—A conviction under an indict-

ment that fails to charge the venue of the offense, which was added by amendment after the testimony was closed and argument begun, is void; and it is not a bar to a subsequent prosecution for the same offense, under Const. Ga. (Code, § 5000).—*Conley v. State*, Ga., 11 S. E. Rep. 659.

43. FRAUDS, STATUTE OF.—Gen. St. Ky. ch. 22, § 1, providing that no action shall be brought on oral agreements not to be performed within one year, from the making thereof, applies only to agreements not to be performed by either party within a year, and therefore such statute cannot be set up as a defense to an action for the second annual installment of the purchase price of certain personalty, the use of which as his property the defendant has had from the beginning.—*Dant v. Head*, Ky., 13 S. W. Rep. 1073.

44. FRAUDS, STATUTE OF.—A husband purchased land, giving his notes for the price, and had the deed made in the name of his son, and delivered to his wife. The son also gave his notes for the purchase money, and gave a mortgage on the land to secure them. Before the notes were due, the husband had the vendor convey part of the land to his wife; and it was agreed that he should surrender one of the notes, that the wife pay the other, and the vendor should resume possession of the balance of the land. *Held*, that the promise of the wife to pay the note, as part of the price of the land conveyed to her, was not within the statute of frauds.—*Bateman v. Butler*, Ind., 24 N. E. Rep. 989.

45. FRAUDS, STATUTE OF.—The delivery and acceptance of a certificate, with plaintiff's name indorsed, showing that he is entitled to 50 shares of stock not yet issued, but held in pool, to be delivered on vote of the directors, or, after six months, on demand and presentation of the certificate, is sufficient to take the sale of plaintiff's interest out of the statute of frauds.—*Meehan v. Sharp*, Mass., 24 N. E Rep. 908.

46. FRAUDULENT CONVEYANCES.—A judgment debtor cannot defeat his own fraudulent conveyances by purchasing through another the property conveyed under a subsequent judgment against himself.—*Heileman v. Eisner*, N. J., 20 Atl. Rep. 46.

47. GIFT—Delivery.—It was the intention of a widow to give her dower in the personalty of her second husband to his children by a former marriage, and she so stated to various persons, though no actual delivery was made. On her death-bed she called her brother to her, and told him that the property in question belonged to these children, and that she wanted him to take charge of it for them, and see that they got it: *Held*, not a sufficient delivery, and that there was no valid gift.—*Rowland v. Phillips*, Ark., 13 S. W. Rep. 1101.

48. GUARDIAN.—Under Code Civ. Proc. Cal., § 1758, which provides that "every testamentary guardian must give bond and qualify," one who was appointed guardian by deed of trust, but failed to give bond, was not a legal guardian.—*Murphy v. Superior Court*, Cal., 24 Pac. Rep. 310.

49. GUARDIAN'S BOND—Subrogation.—Under Const. Ark., art. 9, § 3, providing that the homestead is not exempt from levy for debts due in his fiduciary capacity by the trustee of an express trust, and expressly mentioning a guardian as such a trustee, sureties on the bond of a deceased guardian are entitled to subrogation to the right of the wards to subject the homestead of the guardian to sale for the payment of claims owing by him in his fiduciary capacity.—*Luck v. Atkins*, Ark., 13 S. W. Rep. 1097.

50. HIGHWAYS—Dedication.—A dedication of land for public use as a highway may be made subject to a right to devote a part thereof to use for railroad purposes, and when such portion has been thus devoted, the use as a way will be suspended, and remains suspended so long as that part is used for railroad purposes.—*Ayres v. Pennsylvania R. Co.*, N. J., 20 Atl. Rep. 54.

51. HOMESTEAD—Emblements.—Under Code Tenn. (Mill & V.), §§ 2943, 2944, and section 3250, which give a widow both homestead and dower in her husband's land, both estates to be assigned in the same manner and by the same commissioners, a widow is entitled to the crops growing at the time of her husband's death on the land assigned to her as homestead, just as she is under the common law in the land assigned to her as dower.—*Vaughn v. Vaughn*, Tenn., 13 S. W. Rep. 1089.

52. HUSBAND AND WIFE.—Under Rev. St. Ill., ch. 68, § 6, which provides that married women may make contracts as if unmarried, a husband and wife may make contracts with one another.—*Crum v. O'Rear*, Ill., 24 N. E. Rep. 956.

53. INFANCY—Contracts.—In an action by minors to recover land sold under a power of attorney given by them, defendants answered that plaintiffs obtained title through a deed of gift from their mother, at the time of the execution of which the State had a valid judgment which was a lien on the land; that plaintiffs, after the execution of the deed to them, gave a power of attorney to sell the land to satisfy the judgment; and that their said attorney, in consideration of $100, and the balance due on the judgment, conveyed the land to defendants, who on account of such conveyance paid off the judgment: *Held*, that the defense was good.—*Folts v. Ferguson*, Tex., 13 S. W. Rep. 1037.

54. INSURANCE.—The last inventory having been kept and exhibited to the adjuster of the company 10 days after the fire, and afterwards lost, there is a performance of the condition of the "iron-safe clause" in a fire policy requiring assured to keep and to produce the last inventory taken of his business, and avoiding the policy in the event of a failure to produce it.—*Pelican Ins. Co. v. Wilkerson*, Ark., 13 S. W. Rep. 1103.

55. INSURANCE—Application.—A fire insurance policy indorsed with a copy of an application purporting to have been signed by the insured, and referring to it as made by him, is not avoided by untrue answers, which he did not give, contained in the application, written by an agent with power to solicit insurance, receive premiums, and deliver policies, and by him signed in the name, but without the knowledge or consent of the insured.—*State Ins. Co. v. Taylor*, Colo., 24 Pac. Rep. 333.

56. INSURANCE—Fraud.—Where, after loss of insured property by fire, the insured gives the insurer a receipt for the original premium in full settlement for loss or damage, and surrenders the policy, he cannot afterwards sue on the policy, without first rescinding or offering to rescind the contract of settlement, and refunding the money received by him under it, even though the insurer was guilty of fraud in procuring the settlement.—*Norwich Union Fire Ins. Soc. v. Girton*, Ind., 24 N. E. Rep. 984.

57. INSURANCE POLICY.—An insurance policy contained the clause, "this policy, being for $1,000, covers *pro rata* on each of the following amounts," followed by a list of the articles insured, with the sum for which each was insured, aggregating $3,510. There was no other insurance on the property: *Held*, that the policy insured each article separately for 1000-3510 of the sum named for it in the list.—*Citizens' Ins. Co. v. Ayers*, Tenn., 13 S. W. Rep. 1088.

58. INSURANCE AGENTS—Brokers.—An insurance agent employed by one company to represent it in soliciting applications for insurance, with authority to write and issue policies, is not an insurance broker, nor subject to a city ordinance requiring insurance brokers to pay a license fee.—*Bernheimer v. City of Leadville*, Colo., 24 Pac. Rep. 332.

59. INTERNATIONAL LAW—Chinese Merchants.—The wife and children of a Chinese merchant, who is entitled, under article 2 of the treaty of 1880, and section 6 of the act of 1884, to come within and dwell in the United States, are entitled to come into the country with him or after him, as such wife and children, without the certificate prescribed in said section 6.—*In re Chung Toy Ho*, U. S. C. C. (Oreg.), 42 Fed. Rep. 398.

60. JUDGMENT.—A judgment which recites that defendants were "regularly served with process, as required by law," is not void on its face for want of juris-

diction over the persons of defendants, and will not be vacated on mere motion, made 16 years after its rendition, though there is some evidence that defendants were not properly served with summons.—*People v. Harrison*, Cal., 24 Pac. Rep. 311.

61. JUDGMENT—Collateral Attack.—A judgment of a justice of the peace which recites that the plaintiff against whom it was rendered appeared, is good as against collateral attack though such plaintiff did not in fact appear, or submit to the jurisdiction.—*Williams v. Hays*, Tex., 13 S. W. Rep. 1029.

62. JUDGMENT—Equitable Relief.—A court of equity will not set aside a judgment at law, regular on its face, when it is not shown that the judgment was rendered where no cause of action existed.—*Osborne v. Gehr*, Neb., 46 N. W. Rep. 84.

63. LANDLORD AND TENANT—Summary Proceedings.—In the lease of certain land it was stipulated: "Should default be made in the payment of rent when due, and for three days thereafter, the lessor might re-enter and take possession of the premises, and at his option terminate the lease:" *Held*, that after default a summary proceeding for unlawful detainer cannot be brought, under Code Civil Proc. Cal., § 1161, subd. 1.—*Silva v. Campbell*, Cal., 24 Pac. Rep. 316.

64. LIFE INSURANCE—Warranties.—Statements contained in an application for life insurance are of themselves mere representations, and, in order that they may have the force of warranties, they must not only be made part of the contract, but must also appear, on an examination of the entire contract, to have been deemed conditions upon the literal truth or fulfillment of which the validity of the insurance was intended to rest.—*Vivan v. Supreme Lodge*, N. J., 20 Atl. Rep. 36.

65. MANDAMUS — Executive Officers. — When official acts to be performed by the executive branch of the State government are divided into ministerial and political, and courts assume the right to enforce the performance of the former, it opens a wide margin for the exercise of judicial power. The judge may say what acts are ministerial, and what are political. Circumstances may arise, and conditions may exist, which would require the governor, in the proper exercise of his duty, and with due regard to the interests of the State, not to perform a plain ministerial act. Is the judge to arbitrarily determine his duty in such a case, and by *mandamus* seek to coerce its performance?—*State v. Board of Liquidation*, La., 7 South. Rep. 706.

66. MASTER AND SERVANT.—A brakeman was thrown off the car and killed by the breaking of the chain which connected the shaft that he turned with the brakes. The link which parted was joined with a smooth "cold shut," instead of being properly welded, and the defect was discoverable upon careful examination: *Held*, that the company was liable in providing a chain in which existed this visible imperfection.—*Morton v. Detroit, B. C. & A. R. Co.*, Mich., 46 N. W. Rep. 111.

67. MASTER AND SERVANT — Fellow-servants.—In an action against a railroad company for injuries received by a fireman on a locomotive in a collision with another train, it is no defense that the negligence of the conductor of the latter train, in passing a station without stopping for orders, caused the collision, since he is the representative of the railroad in charge of the train, and not the fellow-servant of the employees on either train.—*Ragsdale v. Northern Pac. R. Co.*, U. S. C. C. (Minn.), 42 Fed. Rep. 381.

68. MECHANICS' LIENS. — Plaintiffs, who furnished machinery to the lessee of a flour-mill, to enable him to convert it into a roller mill, were entitled, as against one holding a vendor's lien on the land, to remove all such machinery capable of removal without serious injury to the mill, although they did not put the former machinery back in the condition it was before being detached.—*Slocum v. Caldwell*, Ky., 13 S. W. Rep. 1069.

69. MORTGAGES—Consideration.—The relationship existing between father and daughter is sufficient to uphold a mortgage given by her to him as security for her deceased husband's debts, though they could not have been enforced as against her.—*Ray v. Hallenbeck*, U. S. C. C. (N. Y.), 42 Fed. Rep. 381.

70. MORTGAGES—Merger.—Where one who has purchased swamp land from a county goes into possession, and executes a mortgage thereon to secure school money borrowed from the county in order to pay the purchase price, a deed subsequently given him by a commissioner appointed by the county to convey swamp lands to those who have paid the purchase money does not operate as a merger or satisfaction of the mortgage.—*Williams v. Brownlee*, Mo., 13 S. W. Rep. 1049.

71. MORTGAGES—Redemption.—In a suit to redeem from the foreclosure of a mortgage, a decree allowing redemption by paying a specified sum by a given date, and providing that on failure to make payment within the given time the mortgage shall stand foreclosed, is not erroneous, in that it does not direct a sale on failure to redeem, where plaintiffs in their petition did not ask such sale, and did not by motion or otherwise, ask the court to modify the decree in that respect.—*Martin v. Ratcliff*, Mo., 13 S. W. Rep. 1051.

72. MORTGAGES—Trusts.—Decedent, being indebted, conveyed land to a trustee in trust to enable the latter "to sell such parts of said property as may be desired to settle and satisfy said debts, * * * and, in order to settle said debts, he may give his individual notes for the same, and execute a mortgage on the before-described lands and lots, or any part thereof, to secure the same, upon such terms * * * as to him may seem proper and advisable:" *Held*, that the deed authorized the trustee to borrow money to meet such debts, and to give his individual note therefor, secured by a mortgage on the land.—*Orr v. Rode*, Mo., 13 S. W. Rep. 1066.

NICIPAL CORPORATIONS.—Charter of city of Athens, § 15, which gives the mayor and council authority to lay out streets and pass all ordinances respecting them, and to make any other regulation that shall appear to them necessary and proper for the security, welfare, and interest of said city, confers no authority to make a contract to obtain the right of way through the city for a railway.—*Covington & M. R. Co. v. Mayor*, Ga., 11 S. E. Rep. 663.

74. MUNICIPAL CORPORATIONS—City Council.—The city council of New Orleans has the right, and it is its duty, to refuse to pass an ordinance to pay claims of doubtful validity. Its decision, however, is not final. The creditor has the right to apply to the courts to have his claim judicially determined, and its payment enforced, if correct and valid.—*State v. City of New Orleans*, La., 7 South. Rep. 691.

75. MUNICIPAL CORPORATIONS—Classification.—A city of the second class does not become a city of the first class by a simple increase in population. Certain steps are required to be taken by the municipality before it can be advanced. These steps are prescribed in chapters, 4, 6, div. 2, tit. 12, pt. 1, Rev. St.—*State v. Wall*, Ohio, 24 N. E. Rep. 897.

76. MUNICIPAL CORPORATIONS—Defective Streets.—In an action against a city for a defective bridge, the fact that the street commissioner officially examined the bridge three days before the accident, and noticed no defect, is not conclusive evidence that the defect did not then exist.—*City of Sherman v. Nairey*, Tex., 13 S. W. Rep. 1028.

77. MUNICIPAL CORPORATIONS—Intoxicants.—The State may not authorize a municipality to enact, nor may a municipality enact, ordinances or rules restricting or prohibiting the delivery in this State to the purchaser of goods purchased by him in another State, unless some law of the congress of the United States permits.—*State v. Stilsing*, N. J., 20 Atl. Rep. 65.

78. NUISANCE.—The fact that plaintiff purchased and located on his land, after the city had established its dump ground, will not preclude his recovering damages

for the negligent manner in which it uses the place for that purpose, whereby it becomes a nuisance.—*City of Sherman v. Langham*, Tex., 13 S. W. Rep. 1042.

79. NATIONAL BANKS—Inspection of Books.—Code Ala. 1886, § 1677, which provides that stockholders of all private corporations have the right to access to, and inspection and examination of, the books, records, and papers of the corporation, at all reasonable and proper times, applies to national banks located within the State; and *mandamus* will lie against the officer having custody of the books to enforce the right.—*Winter v. Baldwin*, Ala. 7 South. Rep. 734.

80. NEGLIGENCE.—Contractors employed in constructing a railroad cannot claim the right of way as their own premises, and thus avoid liability to another working on the same road, injured by their negligence.—*Cameron v. Vandergriff*, Ark., 13 S. W. Rep. 1092.

81. NEGOTIABLE INSTRUMENTS.—In an action on a note by an assignee for value, the maker cannot avoid liability by setting up that the original holder, a corporation, had no authority to loan money, which was the consideration for the note.—*Brown v. United States Home & Dower Ass'n*, Ky., 13 S. W. Rep. 1085.

82. NEGOTIABLE INSTRUMENTS.—In an action against the acceptor of a draft, an answer alleging that defendant was an accommodation acceptor and that the payee had released him from liability, without alleging any consideration for such release, does not state a good defense.—*Franklin Bank v. Severin*, Ind., 24 N. E. Rep. 977.

83. NEGOTIABLE INSTRUMENTS—Payable in Blank.—A promissory note, payable "to the order of——," which was made and delivered for a valuable consideration, is, in legal effect, payable to bearer; and one who buys it from a lawful owner and holder, and afterwards fills the blank by writing his own name therein as payee, which he may lawfully do, is a "subsequent holder," within the meaning of the phrase as it is used in the act of congress defining the jurisdiction of the circuit courts of the United States, and therefore not entitled to sue in this court upon such a note, the original holder and maker both being citizens of Oregon.—*Steel v. Rathbun*, U. S. C. C. (Oreg.), 42 Fed. Rep. 890.

84. OFFICE AND OFFICERS—Bond.—Where a tax collector carries a balance due from him to the State over to the succeeding year, when he enters on a second term, with new sureties, and there is a deficit for such year, it will be considered a deficit for the preceeding year to the extent of such balance; but where the accounts are balanced for such succeeding year, and the collector's private funds are used to the amount of the balance brought forward, the sureties on his bond for the first term are not liable for any deficit that may thereafter occur.—*Newcomer v. State*, Tex., 13 S. W. Rep. 1040.

85. PARTITION—Disclosure of Title.—A defendant in a partition suit, who, after answering, but before decree, acquires an independent title by deed, must make disclosure thereof, or the decree will be conclusive as to his title, and will prevent him from setting up the deed in a subsequent action to recover possession.—*Christy v. Spring Val. Water-works*, Cal., 24 Pac. Rep. 307.

86. PRINCIPAL AND AGENT.—A physician employed by the conductor of a train, after communicating with the general manager, to attend a person injured on the road, cannot recover compensation for his services from the railway company, in the absence of proof that the conductor was authorized to employ him.—*St. Louis, A. & T. Ry. Co. v. Hoover*, Ark., 13 S. W. Rep. 1092.

87. PRINCIPAL AND AGENT.—Plaintiff gave A a power of attorney to settle a claim due him, and subsequently entered into an agreement with defendant whereby, after reciting that defendant had the claim in his hands for collection, plaintiff agreed to give him half of the amount collected. A's authority was not revoked, and plaintiff received half of a payment collected by A and transmitted to him through defendant, without question. A did not claim to act as defendant's agent, but signed receipts as plaintiff's attorney in fact: *Held*, that A was agent for plaintiff, and not for defendant, and the latter was not liable for his misfeasance.—*Hoag v. Graves*, Mich., 46 N. W. Rep. 109.

88. PUBLIC LANDS.—The acquisition of public lands under Gen. Laws Tex. 1883, p. 85, providing for its classification and sale by the land board, and requiring the applicant for the purchase of such land to be an actual settler in good faith, and to have settled on the land with a view to purchasing it, is distinct from the acquisition of land by pre-emption; and, in a suit by the purchaser of such lands to recover possession, evidence on behalf of defendant that he is the head of a family, and that he located on the land for the purpose of acquiring a homestead therein before plaintiff purchased it, is incompetent.—*Luckie v. Watt*, Tex., 13 S. W. Rep. 1035.

89. QUIETING TITLE—Evidence.—Where a complaint in an action to quiet title alleges ownership and possession by plaintiff, a judgment in his favor, based on proof that he is owner, and that defendant had forcibly dispossessed him, will be reversed, and the cause remanded, in order that the complaint may be amended so as to conform to the proof.—*Bryan v. Tormey*, Cal., 24 Pac. Rep. 319.

90. RAILROAD COMPANIES—Fires.—A complaint which alleges that defendant allowed dry grass and other inflammable material to accumulate on its right of way, which caught fire from sparks negligently allowed by defendant's employes to escape from one of the engines, and that the fire spread to plaintiff's land and destroyed his grass, states a good cause of action.—*Chicago, St. L. & P. Ry. Co. v. Burger*, Ind., 24 N. E. Rep. 981.

91. RAILROAD COMPANY—Unsafe Appliances.—Railroad companies should provide safe road-beds. The cross-ties should be sound, and the rails strong, and securely laid. An accident caused by negligence in not thus providing for the safety of their passengers and employees will subject them to damages.—*McFee v. Vicksburg S. & P. Ry. Co.*, La., 7 South. Rep. 720.

92. RELIGIOUS SOCIETIES—Pastor.—The relationship of master and servant does not exist between a local church of Methodist Episcopal denomination and a minister placed in charge thereof by the annual conference for the district in which the church is situated; and the occupancy by the minister of the parsonage attached to the local church is possession by him, and not by the church. Consequently, his refusal to leave it on his suspension from ministerial services and church privileges, subject to the action of the next annual conference, will not render him a trespasser so as to justify the trustees of the local church in evicting him therefrom by violence without the aid of legal process.—*Bristor v. Burr*, N. Y., 24 N. E. Rep. 937.

93. REPLEVIN.—It is harmless error, in an action on a replevin bond, to strike out an allegation in the cross-complaint that the clerk by mistake, in the replevin suit, wrote the judgment that defendants in that suit were the "owners" of the property, whereas the question involved in the suit was the right of possession only, as courts will ignore such judgment, so far as it attempts to settle the question of title, and such allegation added nothing to the cross-complaint.—*Ringgenberg v. Hartman*, Ind., 24 N. E. Rep. 987.

94. REPLEVIN—Chattel Mortgage.—Under Pub. St. Mass. ch. 192, § 6, authorizing an action of replevin to recover mortgaged personalty if it is not forthwith restored on payment or tender, by the person entitled to redeem, of the sum due thereon, plaintiff need not make profert of the money, or renew the tender at the trial.—*Weeks v. Baker*, Mass., 24 N. E. Rep. 905.

95. SALE—Warranty.—In an action for a breach of warranty, where it is shown that plaintiff agreed to buy of defendant a bull, for a certain price, if, after the application of an agreed test, he should prove to be a breeder, and that defendant represented that the test had

been successfully applied, whereas, in fact, the bull was not a breeder, an instruction that the jury need not necessarily believe the defendant guilty of false representations before they could find for plaintiff is proper.—*Bedford v. Megibben*, Ky., 13 S. W. Rep. 1062.

96. SPECIFIC PERFORMANCE.—The specific enforcement of contracts to convey lands is not a matter *ex debito justitiæ*. It is an appeal to the sound discretion of the court. Relief of this character rests, not upon what the court must do, but rather upon what, in view of all the circumstances, it ought to do.—*Page v. Martin*, N. J., 20 Atl. Rep. 46.

97. SUBROGATION—Guaranty.—The guarantor of the performance of the covenants of a lease by the lessee paid a judgment recovered against him by the lessor in an action for damages caused by the lessee's holding over after the expiration of the term: *Held*, that he was entitled to be subrogated to the lessor's right of action against the sureties on an appeal-bond given in an action for possession, by means of which the damages for holding over were materially increased.—*Opp v. Ward*, Ind., 24 N. E. Rep. 974.

98. TAXATION—Valuation.—The county commissioners, sitting as a board of equalization, may raise or lower the valuation placed upon the personal property statement of the owner by the assessor, who received and returned such statement, but as such board they have no power to add to such personal property statement, as returned by the assessor, any additional property not already listed therein.—*Pomeroy Coal Co. v. Emlen*, Kan., 24 Pac. Rep. 340.

99. TAX-SALES—Limitations.—In applying the prescription of Act 105 of 1874 to an action to invalidate a title to property purchased at tax sale, it is the province of this court to see that the sale was made under and by virtue of some law of this State which authorized the sale proceedings; and, in case it appears, from a simple inspection of the title, that it was not so made, the bar of the statute will not be maintained.—*Surget v. Newman*, La., 7 South. Rep. 781.

100. TROVER—Promissory Note.—An indorsee in blank of a promissory note transferred as collateral security, has title and possession sufficient to support an action of trover, of which he is not divested by returning it to the indorser for collection.—*Carter v. Lehman*, Ala., 7 South. Rep. 735.

101. VENDOR'S LIEN—Assignment.—In a suit to enforce a vendor's lien by an assignee of bonds given for the purchase money, the assignor is not a necessary party.—*Kirk v. Sheets*, Ala., 7 South. Rep. 736.

102. VENDOR'S LIEN—Subrogation.—The purchaser of land gave in payment a note signed by himself and a surety, and mortgaged the land to the surety to indemnify him. The surety, having been compelled to pay the note, foreclosed his mortgage after the mortgagor's death: *Held*, that his claim was superior to that of the widow, since by paying the note he became subrogated to the vendor's lien.—*Ballew v. Roler*, Ind., 24 N. E. Rep. 976.

103. VENDOR'S LIEN—Subrogation.—Where the vendee of land gives his note for the purchase price, and afterwards pays the note from the proceeds of property belonging to his minor children, the children, though not entitled to a resulting trust in the land, become subrogated to the vendor's lien.—*Oury v. Saunders*, Tex., 13 S. W. Rep. 1030.

104. WAREHOUSEMEN—Lien.—Laws N. Y. 1885, ch. 526, provides that a warehouseman shall have a lien for his storage charges for moneys advanced by him to pay for cartage, etc., on goods stored with him, and such lien shall include all legal demands for storage which he may have against the owner of the goods: *Held*, that the lien for storage charges is not confined to the particular goods upon which the charges arose, but he has a general lien upon any goods in his possession for a balance due on the general account of the owner.—*Stallman v. Kimberly*, N. Y., 24 N. E. Rep. 939.

105. WATERS—Surface Water.—No responsibility attaches for damages done by the diversion of surface water, where the diversion is merely incidental to and occasioned by the making or alteration of street grades.—*Miller v. Mayor*, N. J., 20 Atl. Rep. 61.

106. WILL—Contest.—An action by the trustees, on behalf of the members of a voluntary religious association, to establish a will making it a devise, is not barred by the reversal of a judgment establishing the same will at the suit of the church as a corporation organized after the rejection of the will by the probate court, the reversal having been because the corporation was held not to be a proper proponent.—*Lilly v. Tobbein*, Mo., 13 S. W. Rep. 1060.

107. WILL—Construction.—A testator devised certain land and other property to his wife for life, in lieu of dower and homestead. The will provided that she might elect to have the land sold by the executors, and take in lieu thereof $3,000 "during her natural life, and that after her death all of said property to her devised and bequeathed (or so much thereof as may remain unexpended) to be converted into money," and divided among certain persons: *Held*, that the wife had the right to spend during her life as much of the $3,000 as she chose.—*In re Cashman*, Ill., 24 N. E. Rep. 963.

108. WILLS—Evidence.—On the contest of a will on the ground of undue influence, evidence as to the feelings of the testatrix towards those related to her is competent.—*Campbell v. Carnahan*, Ark., 13 S. W. Rep. 1098.

109. WILLS—Execution.—How St. Mich. § 5789, requiring wills to be attested and subscribed by witnesses "in the presence of the testator," is sufficiently complied with by signing as witnesses in a room adjoining that in which testatrix is lying, with the door between standing open, where the witnesses sign at testatrix's request, and with her knowledge, and where, after signing, they return to testatrix's room, and inform her that they have signed, and the will is again read to her, and she is shown the witnesses' signatures, and expresses satisfaction, though it is physically impossible for her to see the act of signing.—*Cook v. Winchester*, Mich., 46 N. W. Rep. 186.

110. WILL—Probate.—Under Rev. St. § 3980, providing that, in a proceeding in the circuit court to contest the validity of a will, the issue to be tried is "whether the writing produced be the will of a testator or not," where plaintiff seeks to have an order of probate annulled because, though he was an only child of testator, he is not mentioned therein, and this allegation was denied by defendants, a question not germane to the issue is presented, and it is error for the circuit court to pass upon it. Overuling Kenrick v. Cole, 61 Mo. 572.—*Cox v. Cox*, Mo., 13 S. W. Rep. 1055.

111. WITNESS—Cross-examination.—On a trial for burning insured property with intent to defraud the insurers, where the keeper of a bawdy-house testifies to admissions made by defendant to her within a few days after the fire, it is error to permit defendant to be cross-examined as to whether or not he was at the house on a day six months after the fire.—*People v. Tiley*, Cal., 24 Pac. Rep. 290.

112. WITNESS—Impeachment.—In order to lay a sufficient foundation for the introduction of evidence to contradict the statement of a witness as to a statement alledged or denied by him, it is indispensable that the witness' attention be called to the declaration alleged or denied to have been made, and that the time and place when and where, and the person to whom, such statement should have been made be cited, all of which must be done with reasonable certainty.—*Wood River Bank v Kelley*, Neb., 46 N. W. Rep. 86.